

No. 92-94-CFX
Status: GRANTED

Title: Larry Zobrest, et ux., et al., Petitioners
v.
Catalina Foothills School District

Docketed:
July 13, 1992

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Ball, William Bentley

Counsel for respondent: Richardson, John C.

Entry	Date	Note	Proceedings and Orders
1	Jul 13 1992	G	Petition for writ of certiorari filed.
3	Aug 10 1992		Brief amici curiae of Christian Legal Society, et al. filed.
2	Aug 11 1992		Brief of respondent Catalina Foothills School District in opposition filed.
4	Aug 19 1992		DISTRIBUTED. September 28, 1992
5	Sep 15 1992	X	Reply brief of petitioner filed.
6	Oct 5 1992		Petition GRANTED. *****
7	Nov 16 1992		Brief amicus curiae of Alexander Graham Bell Assn. for the Deaf filed.
8	Nov 18 1992		Brief of petitioners filed.
9	Nov 18 1992		Joint appendix filed.
10	Nov 19 1992		Brief amicus curiae of United States Catholic Conference filed.
11	Nov 19 1992		Brief amicus curiae of United States filed.
12	Nov 19 1992		Brief amicus curiae of Deaf Community Center, Inc. filed.
13	Nov 19 1992		Brief amici curiae of Christian Legal Society, et al. filed.
14	Nov 19 1992		Brief amicus curiae of Institute for Justice filed.
15	Nov 19 1992		Brief amici curiae of American Jewish Congress, et al. filed.
18	Nov 19 1992		Brief amicus curiae of National Jewish Commission Law and Public Affairs filed.
16	Nov 23 1992		LODGING of the 1992 IDEA Report in one volume received from the Solicitor General.
17	Nov 23 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Dec 7 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Dec 17 1992		Brief amici curiae of National Committee for Public Education, et al. filed.
21	Dec 18 1992		Brief of National School Boards Association filed.
22	Dec 18 1992		Brief amicus curiae of Arizona School Boards Association (30 TO BE RECOVERED) filed.
24	Dec 18 1992		Brief of respondent Catalina Foothills School District filed.
23	Dec 21 1992		LODGING consisting of one copy of a report received from amicus curiae Arizona School Boards Assn.
25	Dec 21 1992		Brief amicus curiae of Council on Religious Freedom filed.
26	Dec 21 1992		Brief amici curiae of American Civil Liberties Union, et al. filed.

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Entry	Date	Note	Proceedings and Orders
27	Dec 28 1992		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 24, 1993.(2ND CASE)
28	Jan 4 1993		CIRCULATED.
29	Jan 11 1993	X	Reply brief of petitioners filed.
30	Feb 2 1993		Record filed.
		*	Partial proceedings U. S. Court of Appeals for the Ninth Circuit.
31	Feb 23 1993		Record filed.
		*	Original proceedings United States District Court of Arizona.
32	Feb 24 1993		ARGUED.

92-34

No. 92-

Supreme Court, U.S.
FILED

JUL 13 1992

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and SANDRA
ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, James Zobrest, a boy profoundly-deaf from birth, has complied with the compulsory education laws of Arizona by attendance at the religious school of his parents' conscientious choice. Since he requires the services of a sign language interpreter in order to receive education, petitioner parents applied to respondent public school district for the providing of such services under the terms of the Education For the Handicapped Act (EHA)* for aid to the education of all children with disabilities. Respondent found James fully qualified under those terms to receive such services but declined, solely on Establishment Clause grounds, to furnish them on the premises of his school. The following question is presented:

Does the Establishment Clause bar a public agency from providing sign language interpreter services under EHA to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

* 20 U.S.C. §1400, *et seq.* (and its state counterpart, Ariz. Rev. Stats. §§15-761, *et seq.*). The title of the federal act was changed in 1991 to Individuals With Disabilities Education Act ("IDEA") and, throughout the text, the terms "disabled," or "with disabilities" substituted for "handicapped." Since all documents in the record use the former "EHA" terminology, petitioners have retained that in their petition.

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No. 92-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and SANDRA
ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 1, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which appears as Appendix A hereto, is reported at 1992 W.L. 86206 (9th Cir. (Ariz.)). The dissenting opinion in that court appears as Appendix B. The order and judgment of the United States District Court for the District of Arizona (441 EHLR 564 (D. Ariz. 1989), appealed from in the Court of Appeals, and which appears as Appendix C, is otherwise unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on May 1, 1992. The jurisdiction of this Court is invoked under Title 28 of the United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion . . ."

Education of the Handicapped Act:

20 United States Code, §§1400, 1401, 1412, 1413, 1414(a), 1415, reprinted in Appendix D hereto. (No changes relevant to this case appear in the Individuals With Disabilities Education Act amending EHA.)

Code of Federal Regulations:

34 C.F.R. §§76-651, 76-652 to 76-660; 300.1 to 300.14, 300.110 to 300.132, 300.304, 300.340 to 300.348, 300.401 to 300.403, 300.450 to 300.452, reprinted in Appendix E hereto.

Special Education For Exceptional Children Act:

Arizona Revised Statutes, Art. 4, §§15-761, 15-764 to 15-769, reprinted in Appendix F hereto.

STATEMENT OF THE CASE

In October, 1987 petitioners Larry and Sandra Zobrest requested respondent public school district to provide the service of a certified sign language interpreter for their son, the petitioner James Zobrest, a profoundly deaf boy then 14 years old. Petitioners' application was made pursuant to the provisions of the Education of the Handicapped Act ("EHA"), 20 U.S.C. §1400, *et seq.*, and

its Arizona statutory counterpart, Ariz. Rev. Stats. §§15-761, *et seq.* Respondent, finding James to be a "handicapped person" within the meaning of EHA and Ariz. Rev. Stats. §15-761.7, and qualified under their terms to receive sign language interpreter services (R. 32,33),* issued on his behalf an Individualized Education Program ("IEP") as required by the EHA which specified: "All parties agree that Jim Zobrest needs the services of a sign language interpreter." See App. G. Petitioners then requested respondent to effectuate their IEP through channeling that service to James on the premises of the religious school they had chosen for his attendance, Salpointe Catholic High School.¹ Asserting solely Establishment Clause grounds, respondent declined. The Arizona Attorney General, concurring with respondent's decision, stated that it would be futile for petitioners to exhaust administrative remedies under EHA. (See App. H). (The parties subsequently so stipulated. R. 38-39.)

On August 1, 1988, petitioners brought this action in the United States District Court for the District of Arizona,² alleging economic hardship (R. 2, 27, 39) and claiming that respondent's denial of the requested services of a certified³ sign language interpreter violated the EHA and petitioners' free exercise rights. The complaint sought an injunction requiring the providing of

*The signal "R." refers to the Excerpts of Record in the Court of Appeals.

1. Salpointe is approved by the Department of Education, State of Arizona, and is accredited as a College Preparatory School by North Central Association of Colleges and Schools. R. 51.

2. District Court jurisdiction was invoked pursuant to 20 U.S.C. §1415(2)(4)(A), 28 U.S.C. §§2201, 2202 and Rule 65 of the Federal Rules of Civil Procedure.

3. A certified sign language interpreter is an individual certified by the national Registry of Interpreters For the Deaf and, as such, is bound by the Registry's Code of Ethics. Thereunder "[t]he interpreter's only function is to facilitate communication" without "becoming personally involved." Code of Ethics, 193. R.24-R.26.

the services and, alternatively, "such other and further relief as the Court may deem just and proper." (R. 6.)

The District Court on July 18, 1989, granted respondent's cross-motion for summary judgment and, relying upon *Aguilar v. Felton*, 473 U.S. 373 (1985) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), held that the furnishing of the requested services to James would violate the Establishment Clause by creating "entanglement of church and state that is not allowed." *Zobrest v. Catalina Foothills School District*, 441 EHLR 564 (1989).

On August 4, 1989 respondents filed Notice of Appeal with the United States Court of Appeals for the Ninth Circuit. Briefing in that court was completed December 27, 1989. Two years and four months later, on May 1, 1992, a divided Court of Appeals affirmed the judgment of the District Court. On May 16, 1992, James was graduated from his high school.⁴

Petitioners, both under the prayer of their complaint for relief alternative to injunction and by virtue of 20 U.S.C. §1415(c)(2), now seek reimbursement of the expense they have incurred in paying for the services of a certified sign language interpreter for James for the school years 1988 through 1992. See *School Committee of the Town of Burlington, Massachusetts v. Department of Education*, 471 U.S. 358, 369 (1985); *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 65-66 (1978); *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir., 1991).⁵

4. By order June 2, 1992, thirty-two days following its judgment of May 1, 1992, herein, the Court of Appeals *sua sponte* stayed its mandate until the Supreme Court "issues its opinion in *Lee v. Weisman*, No. 90-1014 and until further order of this court." See App. I.

5. During the four years of James' high school attendance, he has received, on public premises, two weekly 45-minute speech therapy sessions from respondent, with a continuing updating of his IEP in respect thereto.

The Court of Appeals' opinion identifies James Zobrest as "profoundly deaf, qualifying him as a handicapped child under the Federal Education of the Handicapped Act ('EHA'), 20 U.S.C. §1401(a)(1) and Ariz. Rev. Stats. §15-761(6); see also 34 CFR §300.5." App. A, A-4. Further, "[b]oth EHA and state funds are available to provide sign language interpreters. See 34 CFR §300.13. The parties do not dispute that James needs the assistance of a sign language interpreter in the classroom" (*ibid.*) and that that service "is one of the 'special education and related services' to which James is entitled." *Id.* at A-5, n. 1. The court likewise pointed out that, "if James attended either a public or a non-religious private school in Arizona, the Catalina Foothills School District . . . would assume full financial responsibility for the employment of a sign language interpreter for James." *Id.* at A-4, A-5.

Noting that James' parents "feel compelled by their religious convictions to enroll James in a Catholic high school" (*ibid.*), the court stated that that school "is a pervasively religious institution; religious themes permeate the classroom." *Ibid.* Further, "a sign language interpreter would be called up to translate religious precepts and beliefs during the course of James' education." *Ibid.*⁶

The Court of Appeals' affirmance centered upon a single ground: that to provide the services on the premises of James' religious school would have a primary effect advancing religion by creating a "symbolic union" of church and state. (App. A, A-10.) On petitioners' free exercise claim, the court held that "denial of aid to the Zobrests does impose a burden on their free exercise

6. As well, according to the record, as the body of instruction in English, Social Science, Mathematics, Science, Foreign Languages and various electives. (R. 51: Salpointe Catholic High School Parent-Student Handbook, 10 (Academic Program).)

rights" but that the compelling state interest "in ensuring that the Establishment Clause is not violated" justifies imposition of that burden. App. A, A-14. The court dismissed the claim under the Equal Protection Clause raised by petitioners at the Court of Appeals level by stating that "the free Exercise clause does not provide a fundamental right for the Zobrests" and that James is not a member of a protected class whose treatment by the state is subject to strict scrutiny. App. A, A-15, n. 6.

The dissenting opinion of Tang, J., citing the Supreme Court's decisions in the *Witters*, *Mueller*, *Widmar*, *Allen* and *Everson* cases,⁷ said that the majority had erred in its holding that "primary effect advancing religion" is determined by focusing on the specific use to which the interpreter would be put rather than on whether the EHA program as a whole (*i.e.*, embracing all handicapped children whether found in secular or religious settings) could be said to have the proscribed effect. App. B, A-19. The dissent further stated, on four grounds, that the majority and the district court misread and misapplied the Supreme Court's opinions in *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Meek v. Pittenger*, 421 U.S. 349 (1975). First, the legislation in those cases involved aid targeted to private (mostly religious) schools, whereas EHA's benefits, such as sign language interpretation, are diffused over the entire population to all handicapped children in whatever schools (though these will be mostly nonsectarian). "Handicapped children . . . not religious institutions, are the 'primary beneficiaries' of the EHA's and Arizona law's benefits." *Id.* at A-21, A-22.

Second, the dissent noted that the provision of a sign language interpreter, unlike the public assistance provided in *Grand Rapids* and *Meek*, "would not result in

7. *Witters v. Washington Dept. of Services for the Blind*, 471 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), *Widmar v. Vincent*, 454 U.S. 263 (1981), *Board of Education v. Allen*, 396 U.S. 236 (1968), *Everson v. Board of Education*, 330 U.S. 1 (1947).

state funds directly or even indirectly flowing to Salpointe [James' school]." And "[t]he provision of an interpreter . . . would not relieve Salpointe of any preexisting financial or educational obligation." *Id.* at A-23.

Third, while in *Grand Rapids* and *Meek*, government "affirmatively directed educational assistance to religious institutions," if James' school would benefit at all from the EHA program, it would do so "only as a consequence of independent decisionmaking by the Zobrests." *Ibid.*

Fourth, the dissenting opinion found, in the "narrow, isolated and unique" role of the interpreter, "no symbolic union of church and state [which] inures in the simple act of paying the salary of a sign language interpreter." The "mechanical service [of the interpreter], changing words from one language to another" is that of a "technical facilitator," like eyeglasses or a hearing aid. *Id.* at A-25, A-26. The dissent, taking note of *Board of Education Westside Community Schools v. Mergens*, 469 U.S. 226 (1990), found no impermissible union of church and state in the fact that the interpreter would "be used to convey sectarian as well as secular ideas" (*id.* at A-24) or, (citing *Wolman v. Walter*, 433 U.S. 229, 241-244 (1977)), that he/she would be so used on the premises of a religious school. *Id.* at A-25.

While the majority had not reached respondent's "excessive entanglements" claim, the District Court had upheld that claim. The dissent held to the contrary, stating that respondent's supervision of the interpreter does not rise to the level of excessive entanglement; that the interpreter's services are "distinctly more cabined than those of a teacher or therapist," the interpreter being "just a conduit." *Id.* at A-31.

As to petitioners' free exercise claim, the dissent held that no compelling interest justified the state's

withholding the benefits sought by them. *Id.* at A-33.⁸

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Significantly Misconceives *Lemon v. Kurtzman* And Is An Unwarranted Expansion Of This Court's Holding In *Grand Rapids School District v. Ball*

1. The Court of Appeals interpretation of *Lemon* places it squarely in conflict with the holdings of the Supreme Court in *Mueller, supra*, *Witters, supra* and *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Mueller* and *Witters* this Court rejected the contention that neutrally provided governmental assistance to a broad spectrum of individuals, some of whom will make private choices to use the assistance for education at a religious school, automatically has a primary effect advancing religion. And see *Lee v. Weisman*, 60 U.S.L.W. 4723, 4736 (U.S. June 23, 1992) (Souter, J., concurring). In *Kendrick* the

8. The dissent (App. B, fn. 2) noted that neither the parties nor the majority had addressed 34 C.F.R. §76.532 (1984) pertaining to all state-administered federal grant programs and prohibiting the use of grant funds for religious "worship, instruction, or proselytization." §76.532 can only be read as an apparent device to utilize the regulations to express a constitutional viewpoint. It is non-germane to EHA, has nothing to do with aid to the educational needs of children with disabilities, and is at war with EHA's objective to help "all" children with disabilities. A ruling by this Court on the Establishment Clause issue herein should be dispositive of the prohibition of §76.532. And see *Bowen, supra*, at 624-625 (Kennedy, J., concurring). Subsequent to adoption of §76.532, William J. Bennett, as Secretary of Education, on September 12, 1985, by a letter to each Chief State School Officer respecting EHA services, stated that *Aguilar v. Felton, supra*, "need not have the effect of prohibiting on-premises services to private school children in all other Federal programs." *Teague*, EHLR 211:372 (1985). This position has since been confirmed by the Department. See *Davila*, 17 EHLR 1120 (OSEP, 1991). The application of §76.532 herein would unconstitutionally penalize petitioner for his exercise of religious choice in education. See discussion *infra*, 9-10.

Court found no primary effect advancing religion in the bare fact that religious institutions receive government grants.

2. The Ninth Circuit's interpretation of the *Lemon* "primary effect advancing religion" test accentuates the need for this Court to impose logical limitations on the terms "primary" and "advancing." The Ninth Circuit's opinion holds that test to mean that the *primary* effect of the state's affording a deaf person the EHA "related service" of a sign language interpreter on the premises of the religious school he lawfully attends is necessarily to *advance* his religion rather than the acquisition of the body of secular knowledge imparted in a modern American high school. The ruling below fails to recognize that the furnishing of an EHA "related service" on a religious site may have *multiple* effects, accommodating the student's religion being but one. If the court below is correct in its reliance on the "primary effect" test of *Meek v. Pittenger*, 421 U.S. 349 (1975), *Meek* should be reexamined lest application of the primary effect test to *on site* public aid to children in religious schools be held to contradict the logic of this Court's statement, that *Meek* presented

. . . no question 'whether the Constitution permits the states to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church sponsored school . . .'

Meek, supra, at 368, n. 17 (emphasis by Court).

3. The Court of Appeals' conception of "primary effect" ignores the fact that the "advancing" of religion is but one of two effects which the Supreme Court has held to fail the strictures of the Establishment Clause. Governmental action whose primary effect is to *inhibit* religion also breaches the Establishment Clause. *School*

District of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). The Court in *Schempp* cited *Everson v. Board of Education*, 330 U.S. 1 (1947) wherein it had held that "other language of the Constitution" forbids the excluding of individuals, "*because of their faith or lack of it*, from receiving the benefits of public welfare legislation." *Id.* at 16. (Emphasis by the Court.) The present case parallels *Everson*. In each, a public welfare benefit is offered a broad class of children; in each, that benefit is to be realized on religious school premises; in each, it is asked that "tax-raised funds . . . be paid to reimburse individuals on account of money spent by them in a way that furthers a public program" (*Everson*, *supra*, at 6); in each the denial of the benefit (or reimbursement) would plainly penalize (inhibit) religiously grounded conduct. This is especially noteworthy here since, as the court below noted (App. A., A-4, A-5), the school district would provide James an interpreter at a public school *or at a secular private school but not at his religious private school* — plainly a "governmental classification based on religion." *Employment Division v. Smith*, 494 U.S. 872, 886, n. 9 (1990).

The decision below, thus needlessly forcing a conflict between Establishment and Free Exercise principles,⁹ gives rise to the need for its review.

4. The court below, relying on *Grand Rapids School District v. Ball*, *supra*, held that the primary effect of furnishing the service sought by petitioners would be the creating of a "symbolic union of government and religion." But in *Grand Rapids* the Supreme Court narrowly grounded its "symbolic union" teaching on

9. Petitioners have not here raised Free Exercise issues since the Establishment Clause issue is dispositive of this case. The Court of Appeals holds that a compelling state interest (*i.e.*, "ensuring that the Establishment Clause is not violated") justifies imposing a burden on petitioners' acknowledged Free Exercise rights. Thus the court at once employs the Establishment Clause to invade Free Exercise territory and to contradict the teaching of *Smith* respecting the "compelling state interest" test. See, *Smith*, *supra*, 883-884.

realistic considerations respecting whether particular governmental action would "convey a message" of governmental endorsement of religion. *Id.* at 389-390. The Ninth Circuit has now expanded that teaching into a rule which necessarily invalidates all governmental programs of assistance to children at religious sites where they have been placed by their parents for schooling, child care or other purposes. Such a rule is at radical variance with the teaching of *Westside Community Schools v. Mergens*, 469 U.S. 226, 249-250 (1990), which sees "crucial symbolic links" in terms of practical likelihood — *e.g.*, in the instant and like cases, whether the presence and functioning of a state employee (indeed here a non-teacher) who performs EHA "related services" on religious school premises will likely appear to an aided student's peers (or to the public) as government endorsement of a religion. The Ninth Circuit now extends the "symbolic union" doctrine to apply to situations where no such likelihood exists, the nature of the premises alone rendering the service unconstitutional.

II. The Decision Below Renders A Federal Statute For Aid To The Education Of All Handicapped Children Unavailable To Many Of Its Intended Beneficiaries

1. This case presents a question of major importance to children with disabilities and their parents.¹⁰ The

10. The Court has not previously ruled on the question here presented. *Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), cert. denied, 60 U.S.L.W. 3251 (U.S. Oct. 7, 1991) involved a suit by parents to require a public school board to provide, under EHA and Virginia law, cued speech interpreter services to their deaf child on religious school premises. The complaint asserted Free Exercise and Establishment Clause grounds. The Fourth Circuit affirmed a district court ruling denying the services, first, on the independent ground of Virginia law, then, additionally, on statutory and Establishment Clause grounds. In their petition for certiorari the parents presented nine questions and subquestions under both Virginia law, the terms of EHA, and the federal Free Exercise and Establishment Clauses.

federal-state program created by EHA has as its express purpose to assure that "all" handicapped children have available to them special education and related services. 20 U.S.C. §1400. The Act requires the inclusion of private (including religious) school children. 20 U.S.C. §1413(a)(4)(A); 34 C.F.R. §§300.341(b), 300.347, 300.348, 300.401-300.480 and 34 C.F.R. §§76:651-76:663. The decision of the Court of Appeals herein would, by necessary implication, frustrate the affording of the intended benefits of EHA to disabled children who need to receive them at the religious schools chosen by their parents (and wherein they meet the educational requirements of law). For them the Act is rendered inoperative. The decision below "deprives them of a program that offers a meaningful chance at success in life." *Aguilar, supra*, at 431 (O'Connor, J., dissenting).

2. Especially because of the national statute involved in this case, with complementary statutes having been enacted by states, the issue here presented is significant and likely to recur. See *Simon & Schuster v. Crime Victims Board*, 60 U.S.L.W. 4029, 4032 (U.S. Dec. 10, 1991).¹¹

11. The case has already been the subject of national comment. See S. Huefner, *The Establishment Clause as Antiremedy*, Phi Delta Kappan, Sept. 1991, 72; J.R. McKinney, *Special Education and the Establishment Clause*, 65 Education Law Rep. 1 (1991); J.J. Kilpatrick, *Church and State: The Supreme Court Must Try Again to Clarify the Establishment Clause*, The Post and Courier, Charleston, SC, June 3, 1992 (11A).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully urge that this petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY ZOBREST, SANDRA ZOBREST,
husband and wife; JAMES ZOBREST,
a minor, by LARRY and SANDRA
ZOBREST, his parents,

Plaintiffs-Appellants,

v.

CATALINA FOOTHILLS SCHOOL
DISTRICT,

Defendant-Appellee.

No. 89-16035

D.C. No.
CV-88-0516-RMB

OPINION

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding

Argued and Submitted
December 12, 1990—Pasadena, California

Filed May 1, 1992

Before: Thomas Tang, Betty B. Fletcher, and Stephen
Reinhardt, Circuit Judges.

Opinion by Judge Fletcher; Dissent by Judge Tang

SUMMARY

**Individual Rights/Constitutional
Rights/Handicapped**

Affirming a district court grant of summary judgment in
favor of a school district, the court of appeals held that neither

the Establishment Clause nor the Free Exercise Clause was violated by the school district's failure to provide a state-paid sign language interpreter to a handicapped student while he attended a sectarian school.

Appellants Larry and Sandra Zobrest, parents of a handicapped student attending a Catholic school, brought an action against the Catalina Foothills School District under the Federal Education of the Handicapped Act and a counterpart Arizona statute requiring that handicapped students be provided with the services necessary to meet their educational needs. Both EHA and state funds are available to provide sign language interpreters to handicapped students enrolled in public schools. The Zobrests felt compelled to enroll their son in a Catholic high school because of their religious convictions. However, the school district, after obtaining an opinion from the Arizona Attorney General that furnishing an interpreter would violate the Establishment Clause, declined to provide one. The district court granted summary judgment for the school district, denying the Zobrests' motion for injunctive relief. The court ruled that providing such an interpreter to the student in this case would violate the first amendment.

[1] The statutes at issue in this case had a secular purpose of providing the state's handicapped children with assistance in enjoying a full and equal education. [2] Although the court found that the EHA and the corresponding Arizona statutes passed the first part of the *Lemon* case in that they had a secular purpose, their proposed application could not survive the second part of that test. [3] The court noted that an interpreter would be at the student's side in each of his classes at a sectarian school, including religion classes, and the government would create the appearance that it was a "joint sponsor" of the school's activities. [4] Supreme Court cases involving attenuated financial benefits neutrally available to parochial schools from the controlled choices of individuals were unavailing to the Zobrests, [5] as were those that have upheld aid to sectarian schools where the purely secular content of

the goods and services provided was easily ascertainable. [6] Here, the interpreter would have acted in a school environment in which the two functions of secular education and advancement of religious values or beliefs were inextricably intertwined. [7] Thus, if applied as proposed, the primary effect of the statutes in question was not one that either advanced or inhibited religion.

[8] The court also held that the aid the Zobrests sought did not infringe on their rights under the Free Exercise Clause. [9] Although denial of the requested interpreter imposed a burden on their free exercise rights, [10] a compelling state interest justified the imposition of the burden.

In a strong dissent, Judge Tang believed that providing such an interpreter in a Catholic school would not violate the first amendment's prohibition against the establishment of religion. Any indirect benefit enjoyed by the sectarian school would be attributable solely to the Zobrests' independent decision to apply available state aid to their son's education in a sectarian school, and not to any state action sponsoring or subsidizing religion.

COUNSEL

William Bentley Ball, Ball, Skelly, Murren & Cornell, Harrisburg, Pennsylvania; Thomas J. Berning, Arizona Center for Law in the Public Interest, Tucson, Arizona, for the plaintiffs-appellants.

John C. Richardson, DeConcini, McDonald, Brammer, Yetwin & Lacy, Tucson, Arizona, for the defendant-appellee.

OPINION

FLETCHER, Circuit Judge:

The Zobrests appeal the district court's ruling that provision of a state-paid sign language interpreter to James Zobrest while he attends a sectarian high school would violate the Establishment Clause. The Zobrests also argue that denial of such assistance violates the Free Exercise Clause.

We affirm.

BACKGROUND

James Zobrest is a student at Salpointe Catholic High School. He is profoundly deaf, qualifying him as a handicapped child under the Federal Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401(a)(1), and Ariz. Rev. Stat. § 15-761(6); *see also* 34 C.F.R. § 300.5. The EHA provides federal funds to state and local governments for the purpose of educating handicapped children. *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982). In order to obtain federal funds, a state must offer all handicapped children within its jurisdiction a "free appropriate public education." 20 U.S.C. § 1412(1). Under the program, states and school districts provide handicapped students the services necessary to meet their special educational needs. 20 U.S.C. § 1413(a)(4)(A). Arizona has enacted a statutory scheme designed to meet the educational needs of its handicapped students and to qualify it for federal assistance under the EHA. Ariz. Rev. Stat. §§ 15-761 to 15-772.

Both EHA and state funds are available to provide sign language interpreters. *See* 34 C.F.R. § 300.13. The parties do not dispute that James needs the assistance of a sign language interpreter in the classroom. The parties have also agreed that, if James attended either a public or a non-religious private school in Arizona, the Catalina Foothills School District

("School District") would assume full financial responsibility for the employment of a sign language interpreter for James.¹

Salpointe High is a private Roman Catholic school, operated by the Carmelite Order of the Catholic Church. Salpointe is a pervasively religious institution; religious themes permeate the classroom. According to the parties' stipulation of facts, "[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe." Salpointe "encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum." Religion is a required subject for students enrolled at Salpointe, and the students are strongly encouraged to attend the Mass celebrated there each morning. As a result, a sign language interpreter would be called upon to translate religious precepts and beliefs during the course of James's education.

Sandra and Larry Zobrest, James's parents, feel compelled by their religious convictions to enroll James in a Catholic high school.

Prior to their son's enrollment at Salpointe, the Zobrests requested that the School District supply James with a certi-

¹The bulk of EHA benefits are targeted for students enrolled in public schools or placed in private schools by state or local officials. *See* 20 U.S.C. § 1413(a)(4)(B). When parents voluntarily enroll their handicapped children in private school, the state need not pay those children's tuition. 34 C.F.R. § 300.403(a). The state and local school district, however, still must provide "special education and related services" to the private school children. 34 C.F.R. § 300.452(a). For purposes of this litigation, the parties do not dispute that sign language interpretation is one of the "special education and related services" to which James is entitled. The parties agree that, if James's parents enrolled him in a non-sectarian private school or public school, the School District would be obliged to provide a sign language interpreter for him.

fied sign language interpreter for his classes at Salpointe, beginning in August 1988. The School District petitioned the Pima County Attorney for an opinion on the constitutionality of providing such a service. The Deputy County Attorney subsequently advised that furnishing an interpreter would offend both state and federal constitutional prohibitions against a state establishment of religion. See U.S. Const. amend. I, XIV; Ariz. Const. art. 2, § 12. In June 1988, the Arizona Attorney General concurred in the Deputy County Attorney's opinion.²

In August 1988, the Zobrests initiated a civil action under the EHA, 20 U.S.C. § 1415(e), seeking an injunction requiring the School District to provide James with an interpreter. Pending the outcome of this litigation, the Zobrests have employed an interpreter for their son at their own expense. On August 15, 1988, the district court denied the Zobrests' request for a preliminary injunction. The court found that the Zobrests had not demonstrated a likelihood of success on the merits, because the provision of an interpreter would likely offend the first amendment's establishment clause.

On July 20, 1989, the district court granted the School District's motion for summary judgment, holding that the furnishing of a sign language interpreter would in fact offend the first amendment. The court noted that:

The interpreter would act as a conduit for the religious inculcation of James — thereby promoting James's religious development at government expense. That kind of entanglement of church and State is not allowed.

²The parties agreed that, in light of the Deputy County Attorney's and Attorney General's decisions, exhaustion of the EHA's administrative review procedure, 34 C.F.R. §§ 300.506 to 300.510, would be futile. Exhaustion of the EHA's administrative procedures is not required when it is futile. *Honig v. Doe*, 484 U.S. 305, 327 (1988); see also *Wilson v. Marana Unified School Dist.*, 735 F.2d 1178, 1181 (9th Cir. 1984).

Zobrest v. Catalina Foothills School District, No. CIV-88-516 (D.Ariz. Oct. 19, 1989) (order granting summary judgment). The court did not pass on the question of whether the employment of a sign language interpreter would also violate the Arizona Constitution. The Zobrests appeal this order.

STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

Whether the provision of a state-financed sign language interpreter to a student enrolled in a private sectarian school violates the establishment clause is a question of constitutional law that we review de novo. See *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n.2 (9th Cir. 1985). We likewise review de novo the constitutionality of the school district's decision to withhold aid from the Zobrests. *Id.*

DISCUSSION

I. The Establishment Clause

The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I. This prohibition extends to the states through the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

A. The *Lemon v. Kurtzman* Test

To "guide" the Establishment Clause inquiry, the Supreme Court has fashioned a three-part test. *Mueller v. Allen*, 463

U.S. 388, 394 (1983). In general terms, a statute will be upheld if: the statute has a "secular legislative purpose"; the statute's "principal or primary effect [is] one that neither advances or inhibits religion"; and, the statute does not "foster an excessive government entanglement with religion." *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

B. Secular Legislative Purpose

[1] The Supreme Court has noted its "reluctance to attribute unconstitutional motives" to a statute's drafters, "particularly when a plausible secular purpose for the [program] may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. at 394-95. The statutes at issue here evince a secular purpose.

In enacting the EHA, Congress made clear its secular purpose:

It is the purpose of this Chapter to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and Localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

20 U.S.C. § 1400(c).

The Arizona counterpart to the EHA reveals a similar goal of providing the state's handicapped children with the assistance they might need to enjoy full and equal educational opportunities.

[2] Thus, the EHA and the corresponding Arizona statutes pass the first part of the *Lemon* test. However, we find their proposed application cannot survive the second part of that test.³

C. Statutes' Primary Effect

In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), the Supreme Court held that programs under which public school employees provided classes in private schools violated the Establishment Clause, where all but one of the private schools involved were sectarian in nature. The Court found that the programs "may impermissibly advance religion in three ways." *Grand Rapids*, 473 U.S. at 385. One of the impermissible effects the Court cited was that "the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school." *Id.* The

³The Supreme Court has generally considered the validity of a challenged statute "on its face." *Bowen v. Kendrick*, 487 U.S. 589, 600 (1988). However, "[t]here is . . . precedent for distinguishing between the validity of a statute on its face and its validity in particular applications." *Id.*, 487 U.S. at 602. For example, in *Hunt v. McNair*, 413 U.S. 734 (1973), the Supreme Court ruled on the validity of South Carolina's aid under a revenue bond act to an individual college, rather than on the constitutionality of the act as a whole. The court stated: "To identify 'primary effect,' we narrow our focus from the statute as a whole to the only transaction presently before us." *Hunt*, 413 U.S. at 742. In *Bowen*, while the court found the challenged statute to be facially valid, it directed the district court to "consider on remand whether particular ALFA grants have had the primary effect of advancing religion." *Bowen*, 487 U.S. at 622. In this case, we consider only the validity of one very specific proposed application of the statutes at issue. Consideration of the statutes "as applied" seems particularly appropriate because their descriptions of the aid to be provided are extremely broad. See 20 U.S.C. § 1413(a)(4)(A) (requiring states to establish policies and procedures to ensure "by providing for such children special education and related services" that children with disabilities participate in aid programs); Ariz. Rev. Stat. § 15-764 (requiring educational authorities to "provide special education and related services for all handicapped children").

Court noted, "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines." *Id.*, 473 U.S. at 389. The Court cited a lower court opinion, which stated that, "Under the City's plan public school teachers are, so far as appearance is concerned, a regular adjunct of the religious school The religious school appears to the public as a joint enterprise staffed with some teachers paid by its religious sponsor and others by the public." *Id.*, 473 U.S. at 392 (quoting *Felton v. Secretary, United States Dept. of Ed.*, 739 F.2d 48, 67-68 (1984)). The Supreme Court concluded that "the symbolic union of government and religion in one sectarian enterprise . . . is an impermissible effect under the Establishment Clause." *Grand Rapids*, 473 U.S. at 392; see also *Goodall by Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 370-72 (4th Cir.) (provision of sign language interpreter to sectarian school student under EHA and Virginia implementing regulations would violate Establishment Clause), *cert. denied*, 112 U.S. 188 (1991).

[3] Were we to sanction the aid the Zobrests seek, a public employee would be at James Zobrest's side in each of his classes at a sectarian school. With James, the employee would attend religion classes, the nominally "secular" subjects, in which as the parties stipulate, Salpointe faculty are encouraged to "assist students in experiencing how the presence of God is manifest," and the masses at which Salpointe encourages attendance. The interpreter would be the instrumentality conveying the religious message and experience. This presence and function of an employee paid by the government in sectarian classes would create the "symbolic union" *Grand Rapids* found impermissible. By placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a "joint sponsor" of the school's activities.⁴

⁴One might attempt to distinguish *Grand Rapids* on the grounds that all but one of the courses at issue in that case were taught in elementary

Two lines of cases the Zobrests cite in support of their appeal are distinguishable from the case at hand. First, this case does not involve "the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [a] neutrally available . . . benefit" *Mueller v. Allen*, 463 U.S. at 400. In *Mueller v. Allen*, the Supreme Court upheld a Minnesota program under which all parents were entitled to tax deduction for the cost of their children's "tuition, textbooks and transportation." The Court noted that, "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject." *Id.*, 463 U.S. at 388. Similarly, in *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), the Court held that the award of special education assistance to a visually handicapped student who sought to use that assistance at a sectarian college did not violate the Establishment Clause. Again, the Court emphasized the private individual's decision in directing state provided aid: "In this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Witters*, 474 U.S. at 488.

[4] Were we to grant the Zobrests the relief they request, public aid would not be channeled to the sectarian school through the decision of an individual. Instead, the government would be required to place its own employee in the sectarian school. On the facts before us, these cases are unavailing.

school, while the Zobrests seek aid for their son while he attends a Catholic high school. However, while the Supreme Court in *Grand Rapids* expressed special concern for "children of tender years," 473 U.S. at 390, it did not limit its holding to elementary schools. Further, the Zobrests "feel it particularly essential that, at the time of adolescence, James be enrolled in a religious school." They thus implicitly acknowledge the vulnerability of young people of James' age.

[5] Nor can the Zobrests rely on cases in which the Supreme Court has upheld the provision to sectarian schools of aid where the "purely secular content of the goods and services provided" was "easily ascertainable." *Goodall*, 930 F.2d at 371 (emphasis original). "It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Meek v. Pittinger*, 421 U.S. 349, 364 (1975); see also *Lemon v. Kurtzman*, 403 U.S. at 616 ("Our decisions . . . have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities or materials."). In approving such aid to sectarian schools, the Supreme Court has been careful to emphasize the secular nature of this aid. For example, in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), the Court upheld the provision of secular subject textbooks to all schools, including sectarian schools, in New York. The Court observed, "Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." *Allen*, 392 U.S. at 244. In *Wolman v. Walter*, 433 U.S. 229 (1977), the Supreme Court upheld funding for the provision to sectarian schools of secular textbooks, standardized tests and scoring services, speech and hearing diagnostic services and off-site therapeutic and remedial services. In discussing each of these categories, the Court emphasized the secular nature of the aid provided and the capacity for its complete separation from any entanglement; for example, with regard to standardized tests, the Court noted: "The nonpublic school does not control the content of the test or its result. This serves to prevent the use of the test as a part of religious teaching" *Wolman*, 433 U.S. at 240. However, in *Wolman* the Court did not permit funding for the purchase of instructional materials for loan to parents or for

field trip services; with regard to the latter category, the Court stated, "The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable by-product" *Id.*, 433 U.S. at 254.

[6] Here, as the parties stipulate, the interpreter would be required to act in a school environment in which "the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." Unlike the aid approved in *Allen* and *Wolman*, then, the assistance the state would provide in this case cannot be said to be of a clearly secular and separable nature.⁵

[7] Thus, if applied as the Zobrests propose, the statutes at issue fail to survive the second part of the *Lemon* test. We therefore find that state provision of the aid the Zobrests seek would violate the Establishment Clause.

II. Free Exercise Clause

[8] We turn now to the second issue the Zobrests raise:

⁵It could be argued that we might uphold the statutes insofar as they permit James Zobrest to receive the services of a state-paid interpreter during "secular" subjects, prohibiting only the presence of the interpreter during religion classes and mass. While we do not find it otherwise necessary to discuss the third part of the *Lemon* test, we do note that such a solution would place this case within the "Catch 22" in which "the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988). Were we to uphold aid to the Zobrests under these conditions, the government would be required to monitor closely the interpreter's activities to ensure that assistance was not provided at prohibited times. Moreover, as religious instruction at Salpointe is not limited to specific classes, but pervades the entire curriculum, this monitoring would be the kind of "comprehensive, discriminating and continuing state surveillance," *Lemon*, 403 U.S. at 619, the Establishment Clause condemns. See *Meek v. Pittinger*, 421 U.S. at 369-72 (discussing entanglement problems created by need to ensure that "teachers play a strictly nonideological role").

does denial of the assistance of a sign language interpreter unconstitutionally infringe on their rights under the Free Exercise Clause? We find that it does not.

The government places a burden on an individual's free exercise rights when it forces the individual to choose between adhering to her religion, thus forgoing state provided benefits, and abandoning a religious precept in order to receive those benefits. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The imposition of such a burden violates the Free Exercise Clause unless it is justified by some compelling state interest. *Id.*, 374 U.S. at 406. Thus, in *Sherbert v. Verner*, the Supreme Court held that South Carolina could not deny unemployment compensation to a member of the Seventh Day Adventist church because she refused to accept any job which required her to work on Saturday, her faith's Sabbath. *Id.*, 374 U.S. at 404. South Carolina sought to justify its restriction on benefits as a means of combatting fraud; however, the Supreme Court rejected this argument, noting that there was no evidence of fraud, nor had the state demonstrated that it could not accomplish its goal by some less restrictive means. *Id.*, 374 U.S. at 407.

[9] Here, denial of aid to the Zobrests does impose a burden on their free exercise rights. They will have either to forgo a sectarian education for James in order to receive the assistance of a sign language interpreter for him at school, or they will have to pay the cost of the interpreter's services themselves, while keeping him at Salpointe.

[10] However, a compelling state interest justifies the imposition of this burden. The government has a compelling interest in ensuring that the Establishment Clause is not violated. *Goodall*, 930 F.2d at 370; *see also Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476 (7th Cir. 1990) (affirming grant of injunction against mass during public festival held in public park; government cannot convey the message that it is endorsing religion), *cert. denied*, 111 S.Ct. 754 (1991). It is

difficult to imagine a more compelling interest than avoiding a violation of the Constitution. Likewise, here, there is no "less restrictive means" by which the state may accomplish that goal.

Thus, the refusal to provide James Zobrest with a state paid sign language interpreter while he attends a sectarian high school does not violate the Free Exercise clause.*

The judgment of the district court is AFFIRMED.

*The Zobrests also argue that denying James Zobrest the assistance of a sign language interpreter would violate the Equal Protection Clause. As our analysis above makes clear, in this context the Free Exercise clause does not provide a fundamental right for the Zobrests: they have no entitlement to state support for James' religious education in the form they seek. Nor can the Zobrests show that the state's treatment of James Zobrest is subject to strict scrutiny because he is a member of a protected class. The state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment. Thus, the Zobrests' Equal Protection argument must fail.

APPENDIX B

Dissenting Opinion of the United States Court of Appeals
for the Ninth Circuit

TANG, Circuit Judge, Dissenting:

"Justice," Judge Learned Hand once observed, "is the tolerable accommodation of the conflicting interests of society." Few cases more aptly demonstrate the truth of Judge Hand's words than the appeal before us now. For the efforts of the Zobrest family to educate their deaf son in a manner compelled by their religious faith require us to engineer a delicate constitutional balance between the competing goals of freedom of religion, separation of church and state, and equal educational opportunities for the handicapped. The Zobrests have presented us with a ponderous constitutional conundrum, made worse by the opacity of First Amendment jurisprudence. Given the competing values at stake, I cannot fault the majority's resolution of this case. I can state only that I dis-

agree. I believe that the state's provision of a sign language interpreter to James Zobrest for his studies in a Catholic high school would not transgress the First Amendment's prohibition against the establishment of religion. I would therefore reverse the judgment of the district court.

DISCUSSION

I. *The Establishment Clause*

State action impacting religion will survive an Establishment Clause challenge if the action (1) has a secular legislative purpose; (2) has a principal or primary effect that neither advances nor inhibits religion; and (3) does not excessively entangle government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

A. *Secular Legislative Purpose*

I agree with the majority's conclusion that the federal Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401(a)(1), and its Arizona counterpart, Ariz. Rev. Stat. § 15-761(6), pass the first leg of the *Lemon* test because they have secular legislative purposes. That the aid provided under the program would on this occasion benefit religion or religious exercise does not preclude a finding of secular purpose. In *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485-86 (1986), the Supreme Court held that educational assistance provided by the state to visually handicapped students served a valid secular purpose, despite its application in that particular instance to a religious institution. Washington's effort "to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services" constituted a legitimate governmental interest and goal. *Id.* The fact that some small portion of the state's funds ultimately flowed to a religious institution did not undercut the laudatory secular purpose of the law. *Id.* at 486.

Similarly, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Supreme Court held that a state's decision to defray by means of a tax deduction educational expenses incurred by parents "evidences a purpose that is both secular and understandable." *Id.* at 395. The Court reasoned that:

An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well-educated.

Id.; see also *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (the issuance of revenue bonds to assist all colleges in constructing and financing projects has a valid secular purpose because the legislature intended to provide its youth " 'the fullest opportunity to learn and to develop their intellectual and mental capacities' ") (quoting S.C. Code Ann. § 22.41 (Supp. 1971)).

Because government has a valid secular interest in cultivating the talents and skills of handicapped children and in removing barriers to the achievement of their full academic potential, I agree that neither the EHA nor its companion Arizona law has as its purpose the endorsement or promotion of religion.

B. Primary Effect

State actions run afoul of the second branch of the *Lemon* test if they "result[] in the direct and substantial advancement of religious activity." *Meek v. Pittenger*, 421 U.S. 349, 366 (1975). On the other hand, the Establishment Clause will tolerate measures that only indirectly impact upon religion. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973) ("[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid.").

The majority holds that the provision of a sign language interpreter to James Zobrest is unconstitutional because it would have the primary effect of advancing religion. The majority raises the specter of a symbolic union of church and state, and dismisses as inapplicable cases in which similar general educational welfare programs have passed constitutional muster.

I strongly disagree with the majority's interpretation of the relevant precedents and fear that they have exalted form over substance at the expense of handicapped children.

In arguing that the provision of an interpreter would have the primary effect of advancing religion, the majority erroneously focuses on the specific use to which the aid will be put in this case. The proper query is whether the program as a whole has the proscribed primary effect of advancing religion. In *Witters*, a blind student sought to apply Washington's vocational rehabilitation assistance to his religious studies at a private Christian college. The Supreme Court held that the primary effect prong of the *Lemon* test did not forbid the aid. In so holding, the Supreme Court analyzed the entirety of Washington's educational assistance for the handicapped program. *Witters*, 474 U.S. at 487-88; see also *id.* at 492 (Powell, J., concurring) (analyzing whether program aids religion only in context of particular case before the court "conflicts both with common sense and precedent").

Similarly, in *Mueller*, the Supreme Court focused not on whether the tax exemption at issue actually permitted the particular parents to send their children to religious schools. Rather, the Court looked to the broad class of beneficiaries of the exemption, which included all parents of school-age children, whether enrolled in public or nonpublic schools, and concluded that " '[t]he provision of benefits to so broad a spectrum . . . is an important index of secular effect.' " 463 U.S. at 397 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)); see also *Board of Educ. v. Allen*, 392 U.S. 236, 243-

44 (1968) (the provision of secular textbooks does not have as its necessary effect the advancement of religion because the overall benefits of the program extend to all school children; the Court does not analyze the particular effect of the textbook grant on religious students alone); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (same — with respect to transportation to school). Indeed, the use of the word “primary” in the test connotes a survey of the legislation’s total operation, rather than its particular application in the pending case.

I recognize, as does the majority, that the Supreme Court has not always been consistent in applying the primary effects test. In *Hunt*, 413 U.S. at 742, the Supreme Court considered the particular application of a governmental program, rather than its general operation, in assessing primary effect. See also *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Given how closely analogous the *Witters* case is to the one at hand — both involve the constitutionality of general educational benefits programs for the handicapped when applied to religious schools — the primary effects test *Witters* prescribes should govern this case. But even assuming that the narrow primary effect test imposed by the majority were correct, I would still hold that the provision of a sign language interpreter to James Zobrest does not have the primary effect of advancing religion. In holding otherwise, the majority and district court misread and misapply the Supreme Court’s opinions in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) and *Meek v. Pittenger*, 421 U.S. 349. Those cases differ in four significant ways from the one at hand.

First, the legislation at issue in *Grand Rapids* and *Meek* was not the type of general welfare legislation involved here. *Grand Rapids* and *Meek* involve aid programs targeted solely to private schools — the vast majority of which, the Supreme Court emphasized, are sectarian. *Grand Rapids*, 473 U.S. at 384 (forty out of forty-one of *Grand Rapids*’s nonpublic schools “are identifiably religious schools”); *Meek*, 421 U.S.

at 364 (more than 75 percent of Pennsylvania’s nonpublic schools “are church-related or religiously affiliated educational institutions”); see also *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973) (three-judge court), *aff’d mem.*, 417 U.S. 961 (1974). In other words, the Supreme Court considers the identification of legislation’s primary beneficiary to be a critical consideration in determining whether a statute’s primary effect is to benefit religion. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 10-11 (1989) (plurality) (general programs of governmental assistance promoting legitimate secular goals do not have the primary effect of advancing religion even if they relieve religious groups of costs they would otherwise incur; programs targeted exclusively to religious entities, however, are probably unconstitutional).

General welfare programs neutrally available to all children, in both public and private schools, do not suffer the same constitutional disability because their benefits diffuse over the entire population. Religious institutions are incidental, not primary, beneficiaries of such statutory schemes. In *Witters*, the Supreme Court emphasized that Washington’s program provided educational assistance to all handicapped students in the state “‘without regard to the sectarian - non-sectarian, or public - nonpublic nature of the institution benefited.’” *Id.* at 487 (quoting *Nyquist*, 413 U.S. at 782-83 n.38). The broad reach of Washington’s vocational assistance program guaranteed that no “significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.” *Witters*, 474 U.S. at 488.

Likewise, the EHA is a general welfare program providing benefits such as sign language interpretation to all handicapped children, whether they are enrolled in public or private school. Furthermore, the expansive scope of the EHA and its Arizona counterpart ensures that the bulk of the aid provided will be used in nonsectarian schools. Handicapped children across the country enrolled in public and private schools, not

religious institutions, are the "primary beneficiaries" of the EHA's and Arizona law's benefits.

Indeed, in evaluating the constitutionality of educational aid given only to private schools, the Supreme Court has been at pains to distinguish cases like the one at hand, where the state provides assistance broadly to all schools, all school children, or all parents. In *Meek*, the Court specifically stated:

The appellants do not challenge and we do not question, the authority of the [state] to make free auxiliary services available to all students in the [state] including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, *this case presents no question whether the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children only because they attend a Lutheran, Catholic, or other church-sponsored school.*

Id. at 368 n.17 (quotation omitted) (emphasis added); *see also Wolman v. Walter*, 433 U.S. 229, 243 &n.11 (1977); *Nyquist*, 413 at 782-83 n.38. Because the benefits provided by the EHA and Arizona law do not benefit religious institutions primarily or even significantly, those cases holding unconstitutional various forms of aid given only to private schools are not controlling here.

Second, *Grand Rapids* and *Meek* involved educational assistance that either directly or indirectly compensated religious institutions for costs they bore in the course of educating their students. In *Grand Rapids*, state-financed teachers appeared in private schools offering classes to private school students, thus relieving religious institutions of the responsi-

bility (financial and otherwise) of teaching secular subjects. 473 U.S. at 395-97. In *Meek*, the school received instructional materials and equipment directly from the state, disburdening the school of an otherwise necessary cost of performing its educational function. 421 U.S. at 365-66.

The provision of a sign language interpreter, on the other hand, would not result in state funds directly or even indirectly flowing to Salpointe. The public School District, not the private school, employs and pays the interpreter. The provision of an interpreter, moreover, would not relieve Salpointe of any preexisting financial or educational obligation. Nothing in the record or argument suggests that, without state aid, Salpointe itself will undertake the burden of employing an interpreter for James. To the contrary, James's parents have independently hired an interpreter pending the outcome of this litigation.

Third, in *Grand Rapids* and *Meek*, the state, by virtue of its legislation, affirmatively directed educational assistance to religious institutions. By contrast, to the extent Salpointe benefits at all from the EHA program, it does so only as a consequence of independent decisionmaking by the Zobrests. It is because the Zobrests' chose to enroll James in a Catholic high school, and not because of any legislative decree, that EHA benefits will be employed in a sectarian environment. "The historic purposes of the [Establishment] Clause simply do not encompass the sort of attenuated financial benefit, *ultimately controlled by the private choices of individual parents*, that eventually flows to parochial schools from the neutrally available . . . benefit at issue in this case." *Mueller*, 463 U.S. at 400 (emphasis added).

In *Witters*, the Supreme Court found constitutionally significant the fact that religious institutions would receive vocational assistance "only as a result of the genuinely independent and private choices of aid recipients" to attend a religious educational institution. 474 U.S. at 487. The

Supreme Court noted that Washington's vocational assistance program made funds available generally. *Id.* The pupil — not the state — determined whether a religious institution would receive any of the available funds. There, as here, the state created no incentives for students to select sectarian schools and played no role in the decisionmaking process that ultimately determined where the funds would be spent. *Id.* at 488.

Under the EHA and Arizona law, neither the state nor religious bodies can dictate whether, or how much, aid will benefit sectarian institutions. According to the relevant statutory provisions, the sign language interpreter is an employee of the local school district. The sectarian school never receives or even sees the funds used to hire the interpreter. The only persons directly benefiting from the aid are the parents, who are relieved of the financial obligation of paying for a sign language interpreter out of their own pockets, and of course the deaf student. Any indirect benefit enjoyed by Salpointe would be attributable solely to the Zobrests' independent decision to apply neutrally available state aid to their son's education in a sectarian school, and not to any "State action sponsoring or subsidizing religion." *Id.* at 488-89 (emphasis in original).

Fourth, unlike *Grand Rapids*, 473 U.S. at 385, no symbolic union of church and state inheres in the simple act of paying the salary of a sign language interpreter. The role played by the interpreter is narrow, isolated, and unique. Private teachers and students, not the interpreter, will be the source of religious doctrine. The state, for its part, is simply facilitating the education of handicapped students on a general and nondiscriminatory basis. That the state's resources will be used to convey sectarian as well as secular ideas does not necessarily create an impermissible union of church and state. *Cf. Board of Educ. v. Mergens*, 469 U.S. 226, ___, 110 S. Ct. 2356, 2372 (1990) (public high school facilities may be used for meetings of religious clubs in part because "secondary school students are mature enough and are likely to understand that

a school does not endorse or support speech that it merely permits on a nondiscriminatory basis").

The majority places undue emphasis on the fact that the interpreter, a state-paid employee, will perform her services in a sectarian classroom. The First Amendment, however, does not absolutely prohibit the placement of state-paid personnel in religious schools. *See Wolman*, 433 U.S. at 241-44 (state may provide health diagnostic technicians to parochial schools). Nor does the First Amendment strictly foreclose the provision of classroom services by the state. *Allen* upheld the provision of textbooks to parochial school children despite the risk that the books' themes would provide the fodder for religious lessons. 392 U.S. at 243-44. *Witter* went even further and authorized the use of state funds to pay a student's tuition at a religious institution, thereby contributing to the salaries of sectarian instructors.

True, the money in *Witters* went first to the student and then to the school, whereas in this case the money goes from the state directly to the interpreter. But First Amendment rights should not depend on how circuitous a money trail the government constructs. Rather, the constitutionality of extending generally-available benefits to parochial students should be determined by reference to the substantive nature and quality of the aid provided. Functional analysis, not formalistic line-drawing, must be undertaken. A careful study of the nature of the sign language interpreter's task belies the majority's concerns about a symbolic union of church and state.

A sign language interpreter performs a mechanical service, changing words from one language into another. An interpreter neither adds to nor detracts from the message she conveys, nor does she interject personal views and philosophies into the translation. Unlike teachers and therapists, the sign language interpreter is a technical facilitator of communication, not a potential fount of religious doctrine.

I do not understand the majority to say that the First Amendment would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student. Yet these products, like an interpreter, make it possible for a physically-impaired student to receive and decipher religious messages. Perhaps we are not far from the time when machines will be able to translate oral communications into visual cues for the hearing impaired. But we are not there yet. Consequently, because of the nature of his handicap, James Zobrest requires human, rather than purely mechanical, assistance in the classroom. But this distinction should not obscure our evaluation of the nature of the service being performed. A sign language interpreter remains, like a hearing aid, a conveyor, and not an independent source, of communication. Under the circumstances of this case, I do not consider the step from a hearing aid to a sign language interpreter to be a difference of constitutional magnitude.

Further undercutting the majority's symbolic union concern is a recognition that the interpreter's role in the classroom touches only one student. She will not be involved at all in the education of the rest of the student body. Students and the public are thus not likely to be confused by or to have trouble understanding where the state service ends and the religious begins. *Cf. Grand Rapids*, 473 U.S. at 391 ("[S]tudents would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes.").

That the interpreter's appearance in a Catholic school is wholly attributable to the independent decisionmaking of the parents, rather than the actions of the state, further undercuts any symbolic union of the two entities. *Witters*, 474 U.S. at 488-89 ("Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of State endorsement of religion."). In fact, the withholding of vital assistance from a handicapped child solely because of his sincere religious desire to be educated in a Catholic school would evince hos-

tility, not neutrality, towards religion. "The Establishment Clause does not license government to . . . subject [religious practitioners] to unique disabilities." *Mergens*, 496 U.S. at ___, 110 S. Ct. at 2371 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

Rather than suggest an impermissible connection between church and state, the provision of an interpreter would simply demonstrate to the public the government's desire to equalize the educational opportunities of all its students and to help handicapped students overcome barriers to their full academic development. Such aid is religion-blind.

For the foregoing reasons, I would hold that the provision of a sign language interpreter, under the EHA and Arizona law, to a student enrolled in a religious school does not have the primary effect of advancing religion.

C. Excessive Entanglement

The third inquiry prescribed by *Lemon* is determining whether excessive entanglement results from the government's program. To decide whether the provision of a sign language interpreter would sufficiently enmesh the government in religious matters to offend the Establishment Clause, one must assess carefully the interrelationship of church and state that results when such assistance is provided a student.

The district court ruled that state supervision of the interpreter and the nature of her task would unconstitutionally entangle the state in Salpointe's sectarian educational process. The district court noted that, like the therapists whose services were declared unconstitutional in *Wolman*, 433 U.S. 229, the sign language interpreter enjoys close, day-to-day contact with the student in a pervasively religious atmosphere. *Id.* at 247-48. The Supreme Court in *Wolman* felt that this created a danger that "the pressures of the environment might alter [the therapist's] behavior from its normal course" and result

in the transmission of ideological views. *Id.* at 247. The district court perceived the same risk in this case. Although the majority does not reach the entanglement stage of the *Lemon* test, I discuss it to demonstrate the constitutional propriety of affording EHA benefits to parochial students.

In reviewing the district court's decision, I turn first to the question whether supervision of the interpreter's job performance will require the government to intrude unconstitutionally upon Salpointe's religious affairs. Next, I address whether the process of sign language interpretation itself impermissibly involves a state-paid employee in matters of religious doctrine. It should be emphasized at the outset that the mere existence of some interrelationship and cooperation between the School District and Salpointe will not run afoul of the First Amendment. It is only "excessive" entanglement that the Constitution condemns. *Lemon*, 403 U.S. at 613; cf. *Texas Monthly*, 489 U.S. at 10 ("Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes *unduly* into the affairs of the other.") (emphasis added).

1. Supervision

Both parties recognize that the provision of a publicly-funded sign language interpreter necessarily carries with it the baggage of supervision by public officials. The interpreter will receive periodic evaluations of the quality of her work. The School District's special education officials will also need to review at least annually James's educational progress.

Such supervision standing alone does not create constitutionally intolerable levels of state/church involvement. The Constitution will tolerate limited supervisory interactions between public officials and private schools. In *Wolman*, the Supreme Court held that the state's provision of diagnostic health services to private school students did not transgress the Establishment Clause because the program resulted in

only limited contact between public officials, religious officials, and students. 433 U.S. at 244. Likewise, in *Mueller*, the Supreme Court sustained a tax exemption despite the fact that it required public officials to determine whether textbooks promoted religious themes. 463 U.S. at 403. Such carefully channeled interactions do not rise to the level of excessive entanglement. See also *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989) ("[R]outine regulatory interaction which involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring and close administrative contact between secular and religious bodies does not of itself violate the nonentanglement command.") (quotation and citations omitted); *Allen*, 392 U.S. at 245 (officials may label textbooks as secular or sectarian).

Supervision limited to evaluating the sign language interpreter's job performance does not involve the type of day to day, "comprehensive, discriminatory, and continuing state surveillance" that *Lemon* precludes. 403 U.S. at 619. The School District does not suggest that public officials will appear daily, weekly, or even monthly in the classroom as part of their supervisory work. No extra supervision is needed simply because the interpreter works in a sectarian school.¹

Evaluations of the interpreter's work, moreover, will not routinely or necessarily involve the supervising officials in

¹The supervisory entanglement concerns raised by this case thus do not follow the norm. The supervision at issue in an entanglement inquiry frequently pertains to the government's attempts to ensure that its aid is being used only for secular purposes. See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 411 (1985); *Mueller*, 463 U.S. at 403; *Lemon*, 403 U.S. at 616. In this case, however, the supervision relates only to review of a public employee's performance. As in *Witters*, it is a given in this case that the state's assistance cannot be confined to a wholly secular role and will, in fact, permit the recipient to receive religious instruction. The supervision at issue thus avoids the Catch-22 that occurs when the Establishment Clause, on the one hand, requires assurances that aid does not promote sectarian purposes and, on the other hand, uses that very supervision to invalidate the program on entanglement grounds. See *Bowen*, 487 U.S. at 615.

religious matters. Nor does the supervision involve the sheer number of public officials inundating religious establishments that occurred in other cases. The services at issue here, after all, will not be provided to the entire student body. The number of deaf children enrolled in a single parochial school at any given time will be sufficiently low to avoid visiting large numbers of state officials upon the institution. Thus the supervision of James's interpreter will not implicate religious concerns to the same extent as other Establishment Clause cases have.

I would therefore hold that the church/state contacts involved in supervising a sign language interpreter's job performance are sufficiently contained and abbreviated to prevent excessive entanglement.

2. Nature of the Job

The second entanglement inquiry concerns the nature of the sign language interpreter's task. The parties stipulated that, as a general matter, the interpreter's code of ethics obliges her to translate communications completely, without altering, editing, or revising in any manner the content of the message. It is conceded that at times the interpreter will be unable to affect a literal translation of a communication, including religious messages. In such circumstances, the interpreter must use her own judgment and, to the best of her ability, convey the message as accurately as possible.

The nature of the interpreter's role in the classroom does not entail excessive entanglement between a state-paid employee and the church. As noted earlier, the First Amendment does not strictly forbid the placement of any public employee in a parochial school classroom. *Wolman*, 433 U.S. at 241-44. While the Court has ruled that the presence of state-financed teachers and therapists or counselors in parochial schools offends the First Amendment, *Grand Rapids*,

473 U.S. at 387; *Meek*, 421 U.S. at 369-71, the concerns animating those holdings do not obtain in this instance.

The primary entanglement concern articulated by the Supreme Court in *Grand Rapids* and *Meek* is an apprehension that the pervasively religious atmosphere in which the professionals work is likely to infuse their teaching or advice with some religious content. *Grand Rapids*, 473 U.S. at 387 ("[T]here is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school. The danger arises 'not because the public employee [is] likely deliberately to subvert [her or] his task to the service of religion, but rather because the pressures of the environment might alter [her or] his behavior from its normal course.'") (quoting *Wolman*, 433 U.S. at 247); *Meek*, 421 U.S. at 371; see also *Wolman*, 433 U.S. at 247 ("[U]nlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views."); *Lemon*, 403 U.S. at 618-19 ("We simply recognize that a dedicated religious person . . . will inevitably experience great difficulty in remaining religiously neutral. . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.").

Unlike teachers and therapists, a sign language interpreter's job admits of few, if any, opportunities for the transmission or fostering of personal sectarian sentiments. While recognizing that working as a sign language interpreter is both difficult and challenging, the interpreter's services are distinctly more cabined than those of a teacher or therapist. James's interpreter simply takes a message conceived and uttered by one person and neutrally translates it into a comprehensible form for a second person. The expressions and instruction, religious or not, neither originate nor terminate with the interpreter. As the district court noted, she is just a conduit. Unlike teachers and therapists, her function does not entail the discretion to

introduce her own independent or subjective judgments and opinions, to speak her own words, or to transmit her own ideas. Rather, the interpreter performs the more mechanical and objective task of searching for signs that equate with spoken words, and vice versa. The scientific, technical nature of sign language interpretation thus more closely approximates the services of a speech and hearing diagnostician, than of a teacher.

Occasionally, it is true, non-literal translations will have to be made. But even in these narrow instances, the interpreter's role remains confined to a technical search for words and signs that closely approximate each other. I do not believe that the minimal discretion inhering in such decisions creates an unconstitutional risk that the interpreter will use the opportunity to convey her own religious ideas, in violation of her professional ethical obligation to translate accurately.

In sum, I believe that the provision of a sign language interpreter to James Zobrest under the EHA and Arizona law would not unconstitutionally entangle the state in religious affairs. A careful review of the concerns animating the Supreme Court's First Amendment precedents, a thoughtful study of the nature of an interpreter's services, and due respect for the purpose and effects of educational assistance to handicapped children dictate the conclusion that the provision of a sign language interpreter to a deaf child enrolled in parochial school does not result in an unconstitutional fusion of the secular and the sectarian.

II. *The Free Exercise Clause*

I agree with the majority's conclusion that denying the Zobrests a sign language interpreter unconstitutionally burdens their free exercise of religion.

However, because I do not believe that the provision of a sign language interpreter in this case violates the Establish-

ment Clause of the federal Constitution, I would hold that no compelling interest justifies the state's withholding of benefits. To the extent the School District has an interest in separating church and state further than required by the First Amendment, that interest must yield to the Zobrests' free exercise rights. "[T]he State interest asserted here — in achieving greater separation of Church and State than is already ensured under the Establishment Clause of the Federal Constitution — is limited by the Free Exercise Clause." *Widmar*, 454 U.S. at 276. The Zobrests' free exercise rights would also override any additional anti-establishment constraints imposed by the Arizona constitution. *Id.* at 275-76. The School District has articulated no other reason or interest in withholding aid from the Zobrests.²

CONCLUSION

Almost twenty years ago, the Supreme Court observed that:

the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools. . . .

Norwood v. Harrison, 413 U.S. 455, 469 (1973).

With this statement, the Court capsulized the lessons of nearly two centuries of experience interpreting the First

²The parties have not argued that the federal government's desire to separate church and state constitutes a compelling interest overriding the Zobrests' free exercise rights. Accordingly, I do not address either the applicability or constitutionality in this context of the federal prohibition on the use of EHA funds for religious "worship, instruction, or proselytization." 34 C.F.R. § 76.532 (1991).

I believe that the provision of a sign language interpreter to a deaf child enrolled in parochial school constitutes such "cautiously delineated secular governmental assistance." Government's provision of this general welfare benefit to all qualifying school children equally does not create an impermissible establishment of religion. On the other hand, singling out for exclusion from this benefit program only those students engaged in religious conduct compelled by conscience does offend the Free Exercise Clause.

LARRY ZOBREST,)
Plaintiff,)
vs.) NO. CIV-88-516-TUC-RMB
CATALINA FOOTHILLS)
SCHOOL DISTRICT,) ORDER
Defendant.)
_____)

As noted in this Court's order denying the plaintiffs' Motion for a Preliminary Injunction, the role of a sign language interpreter is more analogous to a therapist than a diagnostician. *Wolman v. Walter*, 433 U.S. 229, 244-47, 97 S.Ct. 2593, 2603-05, 53 L.Ed.2d 714 (1977). The interpreter would act as a conduit for the religious inculcation of James — thereby, promoting James's religious development at government expense. That kind of entanglement of church and state is not allowed. *See Aguilar v. Fenton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1752, 44 L.Ed.2d 217 (1975).

DATED: July 18, 1989. /s/ RICHARD M. BILBY
Richard M. Bilby
United States District Judge

United States District Court

DISTRICT OF ARIZONA

LARRY ZOBREST,)	
Plaintiff,)	
vs.	)	CASE NUMBER:
CATALINA FOOTHILLS	)	CIV 88-516-TUC-RMB
SCHOOL DISTRICT,)	
Defendant.)	
_____)	

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXX☐ **Decision by Court.** This action came hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of the Defendant and against the Plaintiff.

July 19, 1989	RICHARD H. WEARE
Date	Clerk

/s/ VIRGINIA ABEYTA
 (By) Deputy Clerk

APPENDIX D

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1401. Definitions

(a) As used in this chapter —

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or

other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Repealed. Pub.L. 98-199, § 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) Repealed. Pub.L. 100-630, Title I, § 101(a)(2), Nov. 7, 1988, 102 Stat. 3289.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American

Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a

high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary

determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, the Secretary shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which the Secretary determines to be reliable authority as to the quality of education or training offered.

The term includes community colleges receiving funding from the Secretary of the Interior under the Tribally Controlled Community College Assistance Act of 1978 [20 U.S.C.A. § 1801 et seq.]

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include —

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) the projected date for initiation and anticipated duration of such services, and

(E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting —

(A) amounts received —

(i) under this subchapter,

(ii) under chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2701 et seq.], or

(iii) under title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 3281 et seq.], and

(B) any State or local funds expended for programs that would qualify for assistance under such subchapter, chapter, or title.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within the State.

(23)(A) The term "public or private nonprofit agency or organization" includes an Indian tribe.

(B) The terms "Indian", "American Indian", and "Indian American" mean an individual who is a member of an Indian tribe.

(C) The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaskan native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]).

(b) For purposes of subchapter III of this chapter, "handicapped youth" means any handicapped child (as defined in subsection (a)(1) of this section) who—

- (1) is twelve years of age or older; or
- (2) is enrolled in the seventh or higher grade in school.

§1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet

the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall —

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. §2791 et seq.] and section 2332(1) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for—

(A) the development and implementation of a comprehensive system of personnel development, which shall include—

(i) inservice training of general and special educational instructional and support personnel,

(ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and

(iii) effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and

(B) adopting, where appropriate, promising educational practices and materials developed through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that—

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet

standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for—

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter—

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handicapped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in

or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which—

(A) advises the State educational agency of unmet needs within the State in the education of handicapped children,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement; and

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

(1) The Secretary shall approve any State plan and any modification thereof which—

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1),

but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) Participation of handicapped children in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all handicapped children enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or

inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of Title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. §§ 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for handicapped children within the State.

§1414. Application**(a) Requisite features**

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that—

(A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only the excess costs directly attributable to the education of handicapped children; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

§1415. Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to—

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

- (i) proposes to initiate or change, or
- (ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or

the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children.

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current

educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if —

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs

may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that —

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

APPENDIX E

(From 34 Code of Federal Regulations)

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

- (1) Which children will receive benefits under the project;
- (2) How the children's needs will be identified;
- (3) What benefits will be provided;
- (4) How the benefits will be provided; and
- (5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

- (a) The needs of students enrolled in private schools.
- (b) The number of those students who will participate in a project.
- (c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

- (1) Have the same needs as the public school students to be served; and
- (2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

- (1) A student enrolled in a private school who receives benefits under the program; and
- (2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs

of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart A – General
PURPOSE, APPLICABILITY, AND GENERAL
PROVISIONS REGULATIONS

§ 300.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(Authority: 20 U.S.C. 1401 Note)

§ 300.2 Applicability to State, local and private agencies.

(a) *States.* This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State education agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency,

(2) Local educational agencies and intermediate educational units,

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the state is responsible for insuring that the rights and protections under this part are given to

children referred to or placed in private schools and facilities by that public agency.

(See §§ 300.400-300.403)

(Authority: 20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

§ 300.3. Regulations that apply to assistance to States for education of handicapped children.

(a) *Regulations.* The following regulations apply to this program of Assistance to States for Education of Handicapped Children.

(1) The Education Department General Administrative Regulations (EDGAR) in 34 CFR part 76 (State-Administered Programs), part 77 (Definitions that apply to Department Regulations), and part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(2) The regulations in this part 300.

(b) *How to use regulations; how to apply for funds.* The "Introduction to Regulations of the Department" at the beginning of EDGAR includes general information to assist in –

(1) Using regulations that apply to Department programs; and

(2) Applying for assistance under a Department program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (§ 300.500 of subpart E)
 Destruction (§ 300.560 of subpart E)
 Direct services (§ 300.370(b)(1) of subpart C)
 Evaluation (§ 300.500 of subpart E)
 First priority children (§ 30.320(a) of subpart C)
 Independent educational evaluation (§ 30.503 of subpart E)
 Individualized education program (§ 300.340 of subpart C)
 Participating agency (§ 300.560 of subpart E)
 Personally identifiable (§ 30.500 of subpart E)
 Private school handicapped children (§ 30.450 of subpart D)
 Public expense (§ 300.503 of subpart E)
 Second priority children (§ 300.320(b) of subpart C)
 Special definition of "State" (§ 300.700 of subpart G)
 Support services (§ 300.370(b)(2) of subpart C)

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980; 55 FR 21714, May 25, 1990]

§ 300.4 Free appropriate public education.

As used in this part, the term *free appropriate public education* means special education and related services which:

- (a) Are provided at public expense, under public supervision and direction, and without charge.
- (b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 300.340-300.349 of Subpart C.

(Authority: 20 U.S.C. 1401(18))

§ 300.5 Handicapped children.

(a) As used in this part, the term *handicapped children* means those children evaluated in accordance with §§ 300.530-300.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) *Deaf* means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) *Deaf-blind* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) *Hard of Hearing* means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of *deaf* in this section.

(4) *Mentally retarded* means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) *Multihandicapped* means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) *Orthopedically impaired* means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) *Other health impaired* means (i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or (ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) *Seriously emotionally disturbed* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) *Specific learning disability* means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation of emotional disturbance or of environmental, cultural, or economic disadvantage.

(10) *Speech impaired* means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) *Visually handicapped* means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(Authority: 20 U.S.C. 1401(1), (15))

[45 FR 42476, Aug. 23, 1977, as amended at 42 FR 65083, Dec. 29, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and further amended at 46 FR 3866, Jan. 16, 1981]

§ 300.6 Include.

As used in this part, the term *include* means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(Authority: 20 U.S.C. 1417(b))

§ 300.7 Intermediate educational unit.

As used in this part, the term *intermediate educational unit* means any public authority, other than a local educational agency, which:

- (a) Is under the general supervision of a State educational agency;
- (b) Is established by State law for the purpose of providing free public education on a regional basis; and
- (c) Provides special education and related services to handicapped children within that State.

(Authority: 20 U.S.C. 1401 (22))

§ 300.8 Local educational agency.

- (a) [Reserved]

(b) For the purposes of this part, the term *local educational agency* also includes intermediate educational units.

(Authority: 20 U.S.C. 1401 (8))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 300.9 Native language.

As used in this part, the term *native language* has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term *native language*, when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(Authority: 20 U.S.C. 880b-1(a)(2); 1401(21))

Comment. Section 602(21) of the Education of the Handicapped Act states that the term *native language*

has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under § 300.505(b)(2) and § 300.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

§ 300.10 Parent.

As used in this part, the term *parent* means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with § 300.514. The term does not include the State if the child is a ward of the State.

(Authority: 20 U.S.C. 1415)

Comment: The term *parent* is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

§ 300.11 Public agency.

As used in this part, the term *public agency* includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children.

(Authority: 20 U.S.C. 1412(2)(B); 1412(6); 1413(a))

§ 300.12 Qualified.

As used in this part, the term *qualified* means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(Authority: 20 U.S.C. 1417(b))

§ 300.13 Related services.

(a) As used in this part, the term *related services* means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) *Audiology* includes:

- (i) Identification of children with hearing loss;
- (ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;
- (iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) *Counseling services* means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) *Early identification* means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) *Medical services* means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) *Occupational therapy* includes:

- (i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;
- (ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and
- (iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) *Parent counseling and training* means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) *Physical therapy* means services provided by a qualified physical therapist.

(8) *Psychological services* include:

- (i) Administering psychological and educational tests, and other assessment procedures;
- (ii) Interpreting assessment results;
- (iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) *Recreation* includes:

- (i) Assessment of leisure function;
- (ii) Therapeutic recreation services;
- (iii) Recreation programs in schools and community agencies; and
- (iv) Leisure education.

(10) *School health services* means services provided by a qualified school nurse or other qualified person.

(11) *Social work services in schools* include:

- (i) Preparing a social or developmental history on a handicapped child;
- (ii) Group and individual counseling with the child and family;
- (iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) *Speech pathology* includes:

- (i) Identification of children with speech or language disorders;
- (ii) Diagnosis and appraisal of specific speech or language disorders;
- (iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) *Transportation* includes:

- (i) Travel to and from school and between schools,
- (ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(Authority: 20 U.S.C. 1401 (17))

Comment: With respect to related services, the Senate Report states:

The Committee bill provides a definition of *related services*, making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

§ 300.14 Special education.

(a) (1) As used in this part, the term *special education* means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in

physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered *special education* rather than a *related service* under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) *At no cost* means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to non-handicapped students or their parents as a part of the regular education program.

(2) *Physical education* is defined as follow:

(1) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and life-time sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(Authority: 20 U.S.C. 1401 (16))

(3) *Vocational education* means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(Authority: 20 U.S.C. 1401 (16))

Comment. (1) The definition of *special education* is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of *handicapped children* in § 300.5.) The definition of *related services* (§300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no *related services*, and the child (because not *handicapped*) is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, *vocational education* includes industrial arts and consumer and homemaking education programs.

Subpart B – State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS – GENERAL

§ 300.110 Conditions of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Secretary through its State educational agency.

(Authority: 20 U.S.C. 1232c(b), 1412, 1413)

§ 300.111 Contents of plan

Each annual program plan must contain the provisions required in this subpart.

(Authority: 20 U.S.C. 1412, 1413, 1232c(b))

ANNUAL PROGRAM PLANS—CONTENTS

§ 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under § 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

- (1) Applies to all public agencies in the State;
- (2) Applies to all handicapped children;
- (3) Implements the priorities established under § 300.127(a)(1) of this subpart; and
- (4) Establishes timeliness for implementing the policy, in accordance with § 300.122.

(Approved by the Office of Management and Budget under control number 1820-0030).

(Authority: 20 U.S.C. 1412(1)(2)(B), (6); 1413(a)(3))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timeliness.* Each annual program plan must include a copy of each statute, court order, attorney general decision, an other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

- (1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and
- (2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(B))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978-1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public private institutions who are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c) The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section. —

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(Authority: 20 U.S.C 1412(2)(A))

Comment: In Part B of the Act, the term *disability* is used interchangeably with *handicapping condition*. For consistency in this regulation, a child with a *disability* means a child with one of the impairments listed in the definition of *handicapped children* in § 300.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a *handicapped* child.

States should note that data required under this section are not to be transmitted to the Secretary in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6 1988]

§ 300.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges; birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General Requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraphs (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(2)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under §§ 300.320-300.324 of Subpart C.

(2) The State priorities meet the timelines under § 300.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in § 300.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in § 300.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities and resources that are to be provided during the next school year.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(3))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 30.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicapped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(Authority: 20 U.S.C. 1412(2)(C))

Comment. The State is responsible for insuring that all handicapped children are identified, located and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in §§ 300.560-300.576.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Secretary shall use the criteria in §§ 300.560-300.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(Authority: 20 U.S.C. 1412(2)(D); 1417(c))

Comment. The confidentiality regulations were published in the FEDERAL REGISTER in final form on February 27, 1976 (41 FR 8603-8610), and met the

requirements of Part B of the Act, as amended by Pub. L. 94-142. Those regulations are incorporated in §§ 300.560-300.576 of Subpart E.

(Approved by the Office of Management and Budget under control number 1820-0030)

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) a copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised and

(2) the procedures which the State educational agency follows in monitoring and evaluating those programs.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(4))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in §§ 300.500-300.514 of Subpart E are met.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(5)(A))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

§ 300.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in §§ 300.550-300.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in regular education programs, consistent with §§ 300.550-300.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(Approved by the Office of Management and Budget under control number 1820-0030)

(Authority: 20 U.S.C. 1412(5)(B))

[42 FR 42476, Aug. 23, 1977. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49144, Dec. 6, 1988]

INDIVIDUALIZED EDUCATION PROGRAMS

§ 300.340 Definition.

As used in this part, the term *individualized education program* means a written statement for a handicapped child that is developed and implemented in accordance with §§ 300.341-300.349.

(Authority: 20 U.S.C. 1401(19))

§ 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(Authority: 20 U.S.C. 1412 (4), (6); 1413(a)(4))

Comment: This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

§ 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under § 300.343.

(Authority: 20 U.S.C. 1412 (2)(B), (4), (6); 1414(a)(5); Pub. L. 94-142, Sec. 8(c)(1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under § 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

§ 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this action, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(Authority: 20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in § 300.342 (October 1, 1977, and the begin-

ning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977, the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in § 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

§ 300.344 Participation in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to § 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the

meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

Authority: 20 U.S.C. 140(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the *teacher* could be the child's special education teacher. If the child's handicap is a speech impairment, the *teacher* could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the *teacher* could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

§ 300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(12) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(Authority: 20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

§ 300.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The proposed dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(Authority: 20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5); Senate Report No 94-168, p. 11 (1975))

§ 300.347 Private school placements.

(a) *Developing individualized education programs.*

(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may

be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before these changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review and revise an individualized education program for the child, in accordance with § 300.343; and

(b) Insure that representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(Authority: 20 U.S.C. 1413(a)(4)(A))

Subpart D—Private Schools

§ 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 300.340-300.349 of subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part) and;

(b) Has all of the rights of a handicapped child who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.460.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsi-

bility, are subject to the due process procedures under §§ 300.500-300.514 of subpart E.

(Authority: 20 U.S.C. 1412(2)(B); 1515)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§ 300.450 Definition of *private school handicapped children*.

As used in this part, *private school handicapped children* means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

[49 FR 48526, Dec. 12 1984]

§ 300.451 State educational agency responsibility.

The State educational agency shall insure that —

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

[45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

§ 300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(Authority: Sec. 1413(a)(4)(A); 1414(a)(6))

[42 FR 42476, Aug. 23, 1977, as amended at 45 FR 22531, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

APPENDIX F

(From Art. 4, Arizona Revised Statutes)

§ 15-756. Powers and duties of superintendent of public instruction

The superintendent of public instruction shall:

1. Enforce the compliance of school districts with the requirements of this article and report to the state board of education those districts which appear to be in noncompliance.

2. Monitor and review all requirements for fiscal and programmatic reporting of bilingual programs and English as a second language programs.

3. Prescribe the procedures for self-assessment as prescribed in § 15-755.

4. Present a summary of the reports specified in § 15-755 and the superintendent's recommendations to the legislature in January of each year.

5. Prescribe the method of counting limited English proficient pupils enrolled in a program to promote English proficiency for the group B weight as prescribed in § 15-943. This method shall require that pupils in kindergarten programs be counted as full-time students.

Amended by Laws 1989, Ch. 273, § 8, eff. June 26, 1989.

ARTICLE 4. SPECIAL EDUCATION FOR EXCEPTIONAL CHILDREN

Administrative Code References

Preschool programs, see A.C.R.R. R7-2-401.

§ 15-761. Definitions

In this article, unless the context otherwise requires:

1. "Educable mentally handicapped" means a child who because of his intellectual development, as determined by evaluation pursuant to § 15-766, is incapable

of being educated effectively through regular classroom instruction without the support of special classes or special services designed to promote his educational development.

2. "Educational disadvantage" means a nonhandicapping condition which has limited a child's opportunity for educational experience resulting in a nonhandicapped child achieving less than a normal level of learning development.

3. "Exceptional child" means a gifted child or a handicapped child.

4. "Gifted child" means a child of lawful school age who due to superior intellect or advanced learning ability, or both, is not afforded an opportunity for otherwise attainable progress and development in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his intellect and ability.

5. "Handicapped child" means a child of lawful school age who due to present physical, mental or emotional characteristics or a combination of such characteristics is not afforded the opportunity for all-around adjustment and progress in regular classroom instruction and who needs special instruction or special ancillary services, or both, to achieve at levels commensurate with his abilities. Handicapped child includes educable mentally handicapped, hearing handicapped, other health impaired, learning disabled, multiple handicapped, multiple handicapped with severe sensory impairment, physically handicapped, seriously emotionally handicapped, severely or profoundly mentally handicapped, speech handicapped, trainable mentally handicapped and visually handicapped.

6. "Hearing handicapped" means a child who has a hearing deviation from the normal, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and

whose intellectual development is such that he is capable of being educated through a modified instructional environment.

7. "Learning disabled" means a child who a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing or motor handicaps, of mental retardation, of emotional disturbance or of environmental, cultural or economic disadvantage.

8. "Multiple handicapped" means a child who has serious learning and developmental problems resulting from multiple handicapping conditions as determined by evaluation pursuant to § 15-766, and who cannot be provided for adequately in a program designed to meet the needs of any one handicapping condition. The multiple handicapped includes a child who is any of the following:

- (a) Autistic.
- (b) Severely or profoundly mentally handicapped.
- (c) Handicapped with two or more of the following conditions:
 - (i) Hearing handicapped.
 - (ii) Physically handicapped.
 - (iii) Trainable mentally handicapped.
 - (iv) Visually handicapped.
- (d) Handicapped with one of the handicapping conditions listed in subdivision (c) of this paragraph existing concurrently with a condition of educable mentally handicapped, seriously emotionally handicapped or learning disabled.

9. "Multiple handicapped with severe sensory impairment" means a child who is multiple handicapped and whose handicapping conditions include at least one of the following:

(a) Severely visually handicapped or severely hearing handicapped in combination with another severe handicap.

(b) Severely visually handicapped and severely hearing handicapped.

10. "Other health impaired" means a child who has limited strength, vitality or alertness due to chronic or acute health problems which adversely affect a pupil's educational performance.

11. "Physically handicapped" means a child who has a physical handicap or disability, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and whose intellectual development is such that he is capable of being educated through a modified instructional environment.

12. "Seriously emotionally handicapped" means a child who because of serious social or behavioral problems, as determined by evaluation pursuant to § 15-766, is unable or incapable of meeting the demands of regular classroom programs in the schools and in the opinion of diagnostic and instructional personnel the child requires special classes or special services designed to promote his educational and emotional growth and development.

13. "Severely or profoundly mentally handicapped" means a child who because of the severity of pervasive deficits in intellectual development, as determined by evaluation pursuant to § 15-766, requires additional educational and related services beyond those provided in regular classroom programs, educable mentally handicapped programs or trainable mentally handicapped programs.

14. "Special education" means the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or handicapped to such an extent that they do not profit from the regular course of study or need special education services in order to profit. Difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is spoken primarily or exclusively shall not be considered a sufficient handicap to require special education.

15. "Speech or language handicapped" means a child who has a communication disorder such as stuttering, impaired articulation, severe disorders of syntax, semantics or vocabulary or a voice impairment, as determined by evaluation pursuant to § 15-766, to the extent that it calls attention to itself, interferes with communication or causes the child to be maladjusted.

16. "Trainable mentally handicapped" means a child who because of his intellectual development, as determined by evaluation pursuant to § 15-766, is incapable of being educated in regular classroom programs or educable mentally handicapped programs without the support of special classes or special services designed to promote his educational development.

17. "Visually handicapped" means a child who has a vision deviation from the normal, as determined by evaluation pursuant to § 15-766, which impedes his educational progress in the regular classroom situation without the support of special classes or special services designed to promote his educational development, and whose intellectual development is such that he is capable of being educated through a modified instructional environment.

Amended by Laws 1986, Ch. 298, § 1, eff. May 5, 1986; Laws 1987, Ch. 363, § 1, eff. May 22, 1987; Laws 1988, Ch. 281, § 1; Laws 1989, Ch. 15, § 2.

Historical Note

Laws 1986, Ch. 298, § 4, effective May 6, 1986, provides:

"Sec. 4. Budget for fiscal year 1986-1987

"Governing boards of school districts shall budget for fiscal year 1986-1987 using the provisions of § 15-761, Arizona Revised Statutes, as amended by this act."

Laws 1987, Ch. 363, § 27, effective May 22, 1987, provides:

"Sec. 27. Budgeting for MHSSI pupils beginning with fiscal year 1988-1989

"Notwithstanding §§ 15-761, 15-901 and 15-943, Arizona Revised Statutes, as amended by this act, school district governing boards may enroll pupils in a multiple handicapped with severe sensory impairment program beginning with fiscal year 1987-1988, but no pupils may be budgeted in that category until the 1988-1989 budget year."

Laws 1988, Ch. 281 § 11 provides:

"Sec. 11. Budgeting for preschool handicapped pupils beginning with fiscal year 1989-1990.

"Notwithstanding §§ 15-761, 15-901, 15-943, 15-961, 15-962 and 15-971, Arizona Revised Statutes, as amended by this act, school district governing boards may budget for preschool handicapped pupils beginning with fiscal year 1989-1990 as provided in this act."

Cross References

Juvenile offenders, educational rehabilitation, see § 8-301.

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

1. Handicapped child

Educational placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op. Atty. Gen. No. I85-014.

In case of child who is developmentally disabled as defined by § 36-551, Department of Economic Security and local district must coordinate in development of the child's individualized education program if residential placement is recommended by the district, and the district must ensure that representative of private school facility or facilities being considered attend or participate in developing the program. Op. Att. Gen. No. I85-014.

§ 15-764. Powers of the governing board of a school district or the county school superintendent

A. The governing board of each school district or the county school superintendent shall:

1. Provide special education and required supportive services for all handicapped children.

2. Employ supportive special personnel, which may include a director of special education, for the operation of special school programs and services for exceptional children.

3. To the extent practicable, educate handicapped children in the regular education classes. Special classes, separate schooling or other removal of handicapped children from the regular educational environment shall occur only if, and to the extent that, the nature or severity of the handicap is such that education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily.

4. Provide necessary transportation for handicapped children in connection with any program, class

or service.

5. Establish policy with regard to allowable pupil-teacher ratios and pupil-staff ratios within the school district or county for provision of special education services.

B. The special education programs and services established pursuant to this section and § 15-765 shall be conducted only in a school facility which houses regular education classes or in other facilities approved by the division of special education.

C. The governing board of each school district shall provide special education to gifted pupils identified as provided in § 15-770. Special education for gifted pupils shall only include expanding academic course offerings and supplemental services as may be required to provide an educational program which is commensurate with the academic abilities and potentials of the gifted pupil.

D. The governing board may modify the course of study and adapt teaching methods, materials and techniques to provide educationally for those pupils who are gifted and possess superior intellect or advanced learning ability, or both, but may have an educational disadvantage resulting from a handicapping condition or a difficulty in writing, speaking or understanding the English language due to an environmental background wherein a language other than English is primarily or exclusively spoken. Programs and services provided for gifted pupils as provided in this subsection may not be separate from programs provided for other gifted pupils, and may not be provided in facilities separate from the facilities used for other gifted pupils. Identification of gifted pupils as provided in this subsection shall be based on tests or subtests that are demonstrated to be effective with special populations including those with a handicapping condition or difficulty with the English language.

E. The governing body of each school district, county or agency involved in intergovernmental agreements may:

1. In cooperation with another school district or districts, establish special education programs for exceptional children. When two or more governing bodies determine to carry out by joint agreement the duties in regard to the special education programs for exceptional children, the governing bodies shall, in accordance with state law and the rules of the division of special education, establish a written agreement for the provision of services. In such agreements, one governing body of each school district, agency involved in intergovernmental agreements or the county shall administer the program in accordance with the contract agreement between the school districts. Tuition students may be included in the agreement. The agreement may also include lease-purchase of facilities for the special education programs for exceptional children.

2. Establish work-experience programs in accordance with rules of the division of special education. The work-experience programs shall consist of classroom instruction, evaluation, training and part-time employment. The evaluation, training and part-time employment may take place on or off the school campus, in or out of the school district, but must be under supervision of certified school personnel. Students enrolled in the work-experience program shall be at least sixteen years of age. Time in a work-experience program shall be counted as attendance at school to qualify for appropriations provided by § 15-769. All work-experience programs must have the approval of the division of special education.

F. The county school superintendent may, upon approval of the division of special education, establish special education programs in the county accommodation schools under his jurisdiction or may cooperate with other school districts by agreement to provide such services for such special programs in accordance with the rules of the division of special education. At the beginning of each school year the county school superintendent shall present an estimate of the current year's

accommodation school exceptional programs tuition cost to each school district that has signed an agreement to use the services of the accommodation school. The tuition shall be the estimated per capita cost based on the number of pupils that each school district has estimated will enroll in the program, and the school district shall pay the tuition quarterly in advance on July 1, October 1, January 1 and April 1. Increases in enrollment during the school year over the school district's estimate of July 1 shall cause the tuition charges to be adjusted accordingly. In the event of overpayment by the school district of residence, the necessary adjustment shall be made at the close of the school year.

Amended by Laws 1986, Ch. 250, § 3; Laws 1989, Ch. 273, § 9, eff. June 26, 1989.

Notes of Decisions

Handicapped children 8

Private therapists 3.5

1. In general

Local school district could provide special education services to a student not enrolled in the district, but the student could not be counted in the district's average daily membership for purposes of state funding but could be counted for purposes of federal funding. Op.Atty.Gen. No. 184-085.

3.5 Private therapist

School district may hire on a fee basis a private speech therapist or pathologist to screen or evaluate students who have been referred as possibly speech-handicapped, but any such private therapist or pathologist must be certificated. Op.Atty.Gen. No. 186-069.

8. Handicapped children

Policy of Education of All Handicapped Children Act, 20 U.S.C.A. § 1401 et seq., to mainstream handicapped children to assure that they are educated with children who are not handicapped must be balanced with primary objective of providing handicapped children with appropriate education. *Wilson v. Marana Unified School Dist. No. 6 of Pima County* (C.A. 1984) 735 F.2d 1178.

§ 15-765. Special education provided in rehabilitation, corrective or other state and county supported institutions, facilities or homes

A. For the purposes of this section and § 15-764, handicapped children being furnished with special education in rehabilitation, corrective or other state and county supported institutions or facilities are the responsibility of that institution or facility, including handicapped children who are not enrolled in a residential program and who are being furnished with daily transportation. Special education programs at the institution or facility shall conform to the conditions and standards prescribed by the director of the division of special education.

B. Notwithstanding the provisions of subsection A of this section, the department of economic security may request on behalf of a school-age handicapped child residing in a residential facility operated or supported by the department of economic security or in a special foster home for mentally retarded persons as described in § 36-558.01 that the school district in which the facility or home is located enroll the school-age child in the district. The school district shall, upon the request by the department of economic security, enroll the handicapped child and provide special education and related supportive services to the child, subject to § 15-825 or chapter 10, article 7 of this title.¹ A school district in which a handicapped child is enrolled shall coordinate

the development of an individual education program plan with the department of economic security's development of an individual plan for the child if the child has applied for or is receiving programs and services for the developmentally disabled provided directly or indirectly by the department of economic security. The provision of special education and related supportive services to a handicapped child may be subject to the provisions of subsection C of this section.

C. A school district or county school superintendent may contract with, and make payments to, other public or private schools, institutions and agencies approved by the division of special education, within or without the school district or county, for the education of and provision of services to exceptional children if the provisions of § 15-766 and the conditions and standards prescribed by the division of special education have been met and if unable to provide satisfactory education and service through its own facilities and personnel in accordance with the rules and regulations prescribed by the division of special education. No school district may contract or make payments under the authority of this section or § 15-764 or any other provisions of law for the residential or educational costs of placement of handicapped children in an approved private special education school, institution or agency unless the children are evaluated and placed by a school district.

D. The school district shall notify the appropriate state agency and the department of education that placement of a child in a private residential program is necessary to provide special education. The education program in which placement is made shall be one which has been approved by the department of education for special education and shall be the least restrictive appropriate program available. The residential program in which placement is made shall be licensed by the department of economic security and shall be the least restrictive appropriate program available. The residential program may include twenty-four hour residential care,

group care or family care on a full-time or part-time basis. Following and in accordance with the consensus decision of the multidisciplinary team as prescribed in § 15-766, the residential placement shall be made by mutual agreement between the school district and the appropriate state agency. The department of education shall enter into interagency service agreements with the department of economic security and the department of health services which shall establish a mechanism for resolving disputes in the event the school district and either the department of economic security or the department of health services cannot mutually agree on the type of residential placement.

E. A school district shall pay the standard educational costs charged by a private or public school, institution or agency for regular day care pupils for each person placed in a residential program as provided in § 15-766. Payments by the school district are authorized only for the period of time the schools within the school district are normally in operation. All noneducational and nonmedical costs incurred by the placement of a person in a private or public school program and concurrent residential program or in a less restrictive placement are payable by the department of economic security for the trainable mentally handicapped, the autistic and the educable mentally handicapped and the department of health services for the seriously emotionally handicapped.

F. The department of economic security or the department of health services, whichever is appropriate, shall determine if the person placed for purposes of special education in a private or public school and concurrent residential program is covered by an insurance policy which provides for inpatient or outpatient child or adolescent psychiatric treatment. The appropriate state agency may only pay charges for residential placement for purposes of special education that are not covered by an insurance policy. Notwithstanding any other law, the appropriate state agency may pay for

placement of the person before the verification of applicable insurance coverage. On the depletion of insurance benefits, the appropriate state agency shall resume payment for all noneducational and nonmedical costs incurred in the treatment of the person. The appropriate state agency may request the person's family to contribute a voluntary amount toward the noneducational and nonmedical costs incurred as a result of placement of the person in a twenty-four hour care facility. The amount which the appropriate state agency requests the person's family to contribute shall be based on guidelines in the rules and regulations of the department of economic security, division of developmental disabilities governing the determination of contributions by parents and estates.

G. If services are offered by the school district and the parent or the student chooses for the student to attend a private facility, either for day care or for twenty-four hour care, neither the school district nor the respective agency is obligated to assume the cost of the private facility. If residential twenty-four hour care is necessitated by factors such as the student's home condition and is not related to the handicap of the student, the agency responsible for the care of the child is not required to pay any additional costs of room and board and nonmedical expenses.

H. A governing board or county school superintendent may contract with a private special education program for the provision of services to seriously emotionally handicapped pupils if the provisions of § 15-766 are met and if unable to provide satisfactory education and service through its own facilities and personnel. For placement of seriously emotionally handicapped pupils in a private special education program the chief administrative official of the school district or county or other person as designated by the school district or county as responsible for special education shall verify that the pupil is diagnosed as seriously emotionally handicapped pursuant to § 15-761, that no appropriate program exists

within the school district or county, as applicable, and that no program can feasibly be instituted by the school district or county, as applicable.

I. A governing board or county school superintendent may establish a special program which provides intensive services to seriously emotionally handicapped pupils who cannot be appropriately served in traditional resource or self-contained special education classes. Such services may be provided in separate facilities with specialized personnel to meet the unique needs of severely handicapped pupils. The chief administrative official of the school district or county or other person as designated by the school district or county as responsible for special education shall verify that a pupil placed in such a program is diagnosed as seriously emotionally handicapped as prescribed in § 15-761 and that appropriate services cannot be provided in traditional resource and self-contained special education classes.

Amended by laws 1985, Ch. 166, § 9, eff. April 18, 1985; Laws 1988, Ch. 127, § 1.

¹Section 15-1201 et seq.

Historical Note

1988 Reviser's Note:

Pursuant to authority of § 41-1304.02, in subsection C the spelling of the first "education", "exceptional" and the first "prescribed" was corrected and in subsection D the spelling of "multi-disciplinary" and "mutually" was corrected

Notes of Decisions

Private facility 2

2. Private facility

Local school district under A.R.S. §§ 15-765(E) and 15-766 must provide 24-hour residential placement in private facility to handicapped student when such placement is necessary for student to receive education and local school district is required to pay educational costs associated with the placement, noneducational and non-medical costs are payable by Department of Economic Security for trainable mentally handicapped and educable mentally handicapped and by Department of Health Services for seriously emotionally handicapped. Op. Atty.Gen. No. 186-010.

§ 15-766. Evaluation of child for placement in special education program

A. The referral of a child for evaluation for possible placement in a special education program shall be made under the direction of the chief administrative official of the school district or county, or such person designated by him as responsible for special education, after consultation with the parent or guardian.

B. Before a child is placed in a special education program an evaluation shall be made of the capabilities and limitations of the child. The evaluation shall be made by at least one professional specialist in a field relevant to the child's handicap and under the direction of the chief administrative official of the school district or county or such person designated by him as responsible for special education. If appropriate, the educational implications of the handicapping conditions shall be evaluated by a psychologist. The school district or county may conduct jointly, directly or indirectly with the department of economic security the special education evaluation of a handicapped pupil enrolled in the

school district or county who has applied for or is receiving mental retardation programs or services from the department of economic security, or may contract with the department of economic security to provide a placement evaluation for the department of economic security or to have the department of economic security provide the special education evaluation for the school district or county. The evaluation pursuant to this section shall contain in writing, but is not limited to:

1. Reason for referral.
2. Educationally relevant medical findings.
3. Educational history of the child including complete documentation of efforts to educate the child in the regular classroom.
4. Determination whether the child's educational problems are related to or resulting from reasons of educational disadvantage.
5. Developmental history of the child.
6. Types of tests administered to the child and results of such tests.
7. Recommendation of specific goals and instructional objectives based upon current levels of performance needs.

C. The results of the evaluation shall be submitted in writing and with recommendations to the chief administrative official of the school district or county or to such person designated by him as responsible for special education.

D. In determining placement the following persons shall be consulted by the chief administrative official of the school district or county or such person designated by him as responsible for special education:

1. The school principal.
2. A person responsible for administering or conducting special education courses in the school or school district and a special education teacher who may provide the special services designed for the child.
3. A teacher who currently has been instructing the child.

4. A professional person qualified in the area of the child's suspected handicap.

5. A parent or guardian of the child and, whenever appropriate, such child.

6. If residential placement is a possibility, a representative of the state agency responsible for noneducational costs of the residential program.

7. Other individuals at the discretion of the parent or school district or county.

E. The chief administrative official of the school district or county or such person designated by him as responsible for special education shall place the child, based upon the consensus reached in the multidisciplinary conference and subject to due process pursuant to 20 United States Code § 1415,¹ except that no child shall be placed or retained in a special education program without the approval of his parent or guardian.

F. The state board of education shall adopt rules governing the evaluation of a child and classification of the child as autistic pursuant to this section.

Amended by Laws 1986, Ch. 298, § 2, eff. May 6, 1986; Laws 1988, Ch. 127, § 2.

¹20 U.S.C.A. § 1415.

Historical Note

1988 Reviser's Note:

Pursuant to the authority of § 41-1304.02, in subsection D, paragraph 4 the spelling of "qualified" was corrected and in subsection E the spelling of "Multidisciplinary" was corrected.

Cross References

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

Private facility 6
Private therapist 5

3. Individual educational program

In case of child who is developmentally disabled as defined by § 36-551, Department of Economic Security and local district must coordinate in development of the child's individualized education program if residential placement is recommended by the district, and the district must ensure that representative of private school facility or facilities being considered attend or participate in developing the program. Op.Atty.Gen. No. 185-014.

Education placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op.Atty.Gen. No. 185-014.

5. Private therapist

School district may hire on a fee basis a private speech therapist or pathologist to screen or evaluate who have been referred as possibly speech-handicapped, but any such private therapist or pathologist must be certified. Op.Atty.Gen. No. 186-069.

6. Private facility

Local school district under A.R.S. §§ 15-765(E) and 15-766 must provide 24-hour residential placement in private facility to handicapped student when such placement is necessary for student to receive education and local school district is required to pay educational costs associated with the placement; noneducational and non-medical costs are payable by Department of Economic

Security for trainable mentally handicapped and educable mentally handicapped and by Department of Health Services for seriously emotionally handicapped. Op.Atty.Gen. No. 186-010.

§ 15-767. Review of special education placement; report of educational progress

The placement of a child in a special education program shall be reviewed by the chief administrative official of the school district or county or such person as designated by him as responsible for special education at least once each year, and a copy of the results of the review shall be submitted to the parent or guardian of the child. The educational progress of a child in a special education program shall be reviewed and reported to the parent or the guardian of the child at least once each semester.

Added by Laws 1981, Ch. 1, § 2, eff. Jan. 23, 1981.
Amended by Laws 1981, Ch. 31, § 1.

Cross References

Preschool programs for handicapped children, see § 15-771.

Notes of Decisions

1. In general

Education placement decisions relating to handicapped children must initially be made by the local school district in which the child resides and preliminary placement decision must be reviewed by school district individualized education program team if child's parents request review. Op.Atty.Gen. No. 185-014.

§ 15-768. Reports to department of education and department of economic security

A. Each governing board shall report annually on or before February 1 to the department of education by handicapping category the number and ages of those handicapped pupils as defined in § 15-761, paragraphs 1, 8, 9 and 16 who are scheduled to graduate or to otherwise terminate their special education programs at or prior to the end of the school year.

B. The department of education shall compile and forward such information to the department of economic security by March 7 of each year.

Amended by Laws 1986, Ch. 298, § 3, eff. May 6, 1986; Laws 1987, Ch. 363, § 2, eff. May 22, 1987; Laws 1989, Ch. 15, § 3.

§ 15-769. Appropriation and apportionment; approval of program

A. Except as provided in this section and § 15-770, all students as defined by § 15-761 shall be included in the entitlement to state aid computed as provided in chapter 9, article 5 of this title¹ and apportionment made as provided in § 15-973.

B. A district may budget using the group B weight for a homebound handicapped pupil if the educational program meets the minimum standards established by the State board of education. For purposes of computing the base support level, a school district shall not classify a pupil in more than one category of special education.

C. The appropriations and apportionment as provided in chapter 9, article 5 of this title shall not be granted to the governing board of a school district or county school superintendent unless the school district or county complies with the provisions of this article and the conditions and standards prescribed by the superintendent of public instruction pursuant to rules of the state board of education for pupil identification and placement pursuant to §§ 15-766 and 15-767.

D. If a pupil does not receive special education instructional services but receives at least one ancillary service, the pupil shall be considered a special education student for the group B funding. If the handicapping category has both a resource and self-contained weight, the pupil shall be classified as in a resource program. In this subsection, "ancillary service" means one of the following:

1. Physical therapy.
2. Occupational therapy.
3. Orientation and mobility training.
4. Sign language interpretation services.

5. A full-time aide needed for an individual pupil to benefit from the pupil's instructional program as specified in the pupil's individualized education program.

Amended by Laws 1985, Ch. 127, § 2; Laws 1989, Ch. 15, § 4.

¹Section 15-971 et seq.

Historical Note

The 1989 amendment deleted "and regulations" following "pursuant to the rules" in subsec. C; added subsec. D; and rewrote subsec. B which read:

"A school district shall compute the base support level as provided in § 15-943 with reference to the student count for group B students who attended classes and programs having a minimum of two hundred forty minutes of instruction or work experience as provided in § 15-764, subsection E per school day or having a minimum of one thousand two hundred minutes a week, except that a child receiving instruction under the home-bound teaching program is deemed in the school enrollment if he attends classes or receives instruction for a period of not less than four hours per week. For purposes of computing the base support level, a school district shall not classify a pupil in more than one category of special education."

APPENDIX G

CATALINA FOOTHILLS SCHOOL DISTRICT
SPEECH/LANGUAGE/HEARING

NAME Jim Zobrest DATE September 21, 1988
DATE OF BIRTH 3-2-74 SCHOOL Slapointe High School

EVALUATOR Mary K. Hodgson
Catalina Foothills School District

Jim is a ninth grade, profoundly deaf student who had received all of his education prior to sixth grade in a school for the deaf. He attended grades six through eight in the Catalina Foothills School District and is presently enrolled as a freshman at Salpointe High School. Catalina Foothills Schools provided him a mainstream program where he received resource room assistance for academics, speech/language therapy, and an interpreter who accompanied Jim to all classes. Jim's primary language is sign language which he used almost exclusively in classrooms. By mutual agreement he used little or no sign in speech class. All speech work and evaluation were done orally using total communication — oral speech, sign, gesture, and writing. Receptively he depends upon lip reading and the use of residual hearing.

Jim wears binaural hearing aids and has just been fitted with new aids. (audigram to follow) Vision problems were discovered during a school screening in school year 86-87. He was examined by a physician and fitted with glasses. Later he was fitted with contact lenses.

Educational Evaluation: Year end grades – See attached
ITBS scores. – See attached

Speech Evaluation:

Jim's ability to lip read was measured using a 100 Word Vocabulary List which represents consonant sounds in all positions of a word. Lip reading the word

list alone, out of context, Jim was able to repeat 52%. Lip reading the word in context raised his score to 89%. Words most difficult to lip read are those with poor visibility /d/, /t/, /k/, /g/ he substitutes an /h/ for these in all positions in a word.

Production was measured using the Goldman Frisloe Articulation Test pictures. (clinically because of absence of norms for the deaf) Once again, Jim was able to produce intelligibly all consonant and vowel sounds with the exception of /d/, /t/, /k/, /g/, / /, / /, and / /. Conversational speech is 40% intelligible when content is known and 59% for unknown content.

Total language scores on the ITB6, administered in April of 1988 – 81%, 7 stanine. Vocabulary at 26% and 4th stanine was his lowest language score – all others were at or above the 50th percentile.

Year end grades, all of which represent work in a standard classroom except math which was a remedial class, are all A's and B's.

Jim was phased out of special resource room help in February of 1988.

SHORT TERM GOALS: Attached

LONG TERM GOALS:

- XX 1. The student's speech skills will be developed to a level appropriate for his/her age.
- XX 2. The student's Receptive/Expressive language skills will be developed to a level appropriate for his/her age.
- X 3. The student's articulation will be developed to a level appropriate for his age.

RELATED SERVICES:

Transportation: The district will reimburse for transportation expenses in accordance with and subject to conditions (with the exception that the meeting place will be Canyon View School instead of Orange Grove

Junior High School) set forth in the letter dated 9-8-88 between Tom Berning and Denise M. Bainton, a copy of which has been given to the parents.

All parties agree that Jim Zobrest needs the services of a sign language interpreter. The issue of whether the district is required by state or federal law to pay for such services while Jim Zobrest is a student at Salpointe Catholic High School is currently the subject of litigation in Federal District Court.

As a result of this consultation, and with full awareness of my parents rights, I ____ approve, I ____ disapprove:

____ Continuation of program ____ Termination of program
XX Transfer from school based to itinerant level of program.
 SZ Parental rights, Confidentiality Statement and prior IEP reviewed (parent, please initial).

The preceeding has been explained to me in my primary language. I reserve the right to reconsider this decision at a later date.

/s/ Sandra Zobrest
 Signature of Parent or Guardian
 PS: Color White: Sp. Ed. Office
 Yellow: Resource

Oct. 5, 1988
 date

1/87.

CATALINA FOOTHILLS SCHOOL DISTRICT
 2101 East River Road, Tucson, Arizona 85718

STUDENT: Jim Zobrest
 SCHOOL: Salpointe High School
 RESOURCE TEACHER: Hodgson
 DATE:
 CATEGORY: Speech/Language

OBJECTIVES

TM – Totally Met PM – Partially Met NM – Not Met

All goals will be considered met at 80% accuracy over six (6) consecutive meetings.

1. Student's conversational speech intelligibility will be increased from 40% to 60% when content is unknown.
2. Student's conversational speech intelligibility will be increased from 69% to 90% when content is known.
3. Student will produce a /t/ sound in single word drill (See 87-88 IIP)
4. Student will produce a correct /d/ in single word drill (see 87-88 IIP)
5. Student will produce a correct /k/ in isolation. (see 87-88 IIP)
6. Student will produce a correct /g/ in isolation.
7. Student will increase his lip reading percentage for single words from 52% to 90%.
8. Student will reduce mean number of re-statements – academic and socially from 9 to 5.
9. Student will learn five new content area vocabulary words a week.
10. Student will improve his overall communication skills – using speech, sign, gesture and writing – from 64% to 80%.

CATALINA FOOTHILLS SCHOOL DISTRICT

NAME Jim Zobrest

DATE OF BIRTH 3-2-74

EVALUATOR Mary Hodgson

Catalina Foothills School District

SPEECH/LANGUAGE/HEARING EVALUATION

DATE September 21, 1988

SCHOOL Salpointe High School

1. CONVERSATIONAL SPEECH:

Conversational speech intelligibility when context is unknown — 40%

Conversational speech intelligibility when context is known — 69%

2. CHARTED CONVERSATIONS:

Chartered conversations from 9-20-87 through 6-3-88 counting number of re-statements which culminate in a written message. Mean number of written re-statements was 9 with a range of 3 to 21.

3. CHARTED ACADEMIC SPEECH:

Speech from 9-20-87 to 6-3-88 Observing Jim in various academic settings and charting interaction possibilities against actual number, suggest a student who communicates successfully 64% of the time.

4. LIP READING:

100 word list representing all sounds in English — lip reading alone — 52%

100 word list (same list) in context — 89%

5. ARTICULATION:

Articulation was evaluated using pictures from Goldman Fristoe Articulation Test.

Missing Sounds

Initial	Medial	Final
/g/ h/g	h/g	omit
/k/ h/k	h/k	h/k
/D/ (ing)	h/D (ing)	c/D
/t/ h/t		a/
/s/(sh) s/s	s/s	omit
/ts/(ch) h/t	t/ts	omit
/d/3(j) h/d3	h/d3	omit

6. GENERAL LANGUAGE:

Language Sample — Jim's oral language is very advanced. All 21 content categories are present. Form is somewhat delayed due to limited vocabulary and sound distortions. However, grammar and syntax are appropriate — correct pronoun usage and noun/verb agreement are consistent. Use is also advanced in that he knows when to use various forms — however, some social aspects or oral language require additional work, i.e., talk with his interpreter while teacher is lecturing, demanding attention from another student during group activities. He has developed the excellent classroom behavior of stopping the teacher when he does not understand, asking pertinent questions, contributing to the discussion, answering questions. Oral interactions (without the interpreter) have increased markedly over the three years Jim has been in Catalina Foothills School District. He uses Total Communication — a combination speech, sign, gesture and writing. He enters conversations, maintains/changes topics, adds information and asks questions — both academically and socially.

Sentence length is appropriate and complicated grammatic forms are consistently used.

During the past year his interpreter insisted that Jim sign/speak at all times. This has resulted in considerable improvement in intelligently since it forces him to speak more slowly and to finger spell/speak words that are difficult to understand.

Many teachers and students deal directly with Jim and bypass the interpreter using the various Total communication skills.

APPENDIX H

Zobrest, et al.,)	
)	
Plaintiffs,)	
	)	NO. CIV. 88-516
vs.	)	TUC-RMB
)	
Catalina Foothills School)	
District,)	
)	
Defendant.)	

AFFIDAVIT

STATE OF ARIZONA)
)
 COUNTY OF MARICOPA)

I, LINDA S. PAVOL, being first duly sworn upon my oath, depose and say:

That I am legal counsel for the Arizona Department of Education and have personal knowledge of the facts set forth in this affidavit, and am a licensed member of the State Bar of Arizona.

A.A.C. R7-2-405 provides that the final administrative appeal of a special education due process hearing decision shall be conducted by the Division of Special Education, Arizona Department of Education.

On June 27, 1988, the Arizona Attorney General issued an opinion on the precise issues of this lawsuit, and concluded that it is constitutionally impermissible for a public school to provide the services of an interpreter for a deaf student who chooses to attend a parochial school (Ariz. Atty. Gen. Op. I88-072, copy attached). In view of this unusual circumstance, it appears futile for the parties to pursue administrative remedies.

A-136

DATED this 29th day of December, 1988.

/s/ LINDA S. PAVOL
LINDA S. PAVOL
Assistant Attorney General
State of Arizona

SUBSCRIBED AND SWORN to before me this
29th day of December, 1988.

/s/ ELIZABETH BONER
NOTARY PUBLIC

My Commission Expires:
April 17, 1989
3433A.73

A-137

Attorney General
1275 West Washington
Phoenix, Arizona 85007
Robert L. Corbin

June 27, 1988

The Honorable Stephen D. Neely
Pima County Attorney
Civil Division
32 N. Stone, Suite 1500
Tucson, Arizona 85701-1412

Re: I88-072 (R88-059)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B) we have reviewed your April 26, 1988 opinion to the Assistant Superintendent of Catalina Foothills School District and concur with your conclusion that a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates the First Amendment of the Federal constitution and art. II, § 12 of the Arizona Constitution.

Sincerely,

/s/ Bob Corbin
BOB CORBIN
Attorney General

BC:LSP;pnw

APPENDIX I

FILED

JUNE 2 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

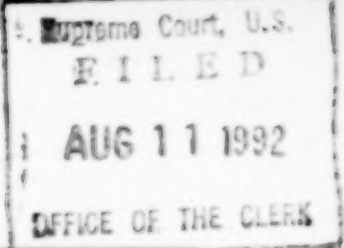
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY ZOBREST; SANDRA	) No. 89-16035
ZOBREST, husband and wife;	) D.C. # CV-88-0516-RMB
JAMES ZOBREST, a minor, by)
LARRY and SANDRA ZOBREST,)
his parents,)
<i>Plaintiffs-Appellants,</i>	) ORDER
v.)
CATALINA FOOTHILLS SCHOOL)
DISTRICT,)
<i>Defendant-Appellee.</i>)
_____)

BEFORE: TANG, FLETCHER, and REINHARDT,
Circuit Judges.

The mandate is stayed until the Supreme Court
issues its opinion in *Lee v. Weisman*, No. 90-1014 and
until further order of this court.

No. 92-94



In The
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and
wife; JAMES ZOBREST, a Minor, by LARRY and
SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

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Attorneys for Respondent

QUESTION PRESENTED

Whether the employment by a public school district of an individual to provide sign language interpreter services in the classrooms of a pervasively sectarian parochial high school violates the requirement of separation of church and state, as provided in the establishment clause of the First Amendment.

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No. 92-94

In The

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LARRY ZOBREST, SANDRA ZOBREST, husband and
wife; JAMES ZOBREST, a Minor, by LARRY and
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Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent Catalina Foothills School District No. 16 of Pima County, Arizona ("Respondent"), by and through its counsel of record, respectfully responds to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (the "Petition"). For the reasons set out herein, Respondent respectfully requests that the Petition be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992). The decision of the United States District Court for the District of Arizona is not reported. Both decisions are reproduced in the Appendix to the Petition.

JURISDICTION

Respondent agrees that this Court has jurisdiction to consider the Petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioners' listing of constitutional and statutory provisions involved in this matter, except that 34 C.F.R. § 76.532 also should be listed. The text of 34 C.F.R. § 76.532 is reproduced in Appendix E to the Petition.

STATEMENT OF THE CASE

Respondent is in general agreement with the facts set out in Petitioners' Statement of the Case, and believes that Petitioners' characterization and summary of the Court of Appeals opinion is reasonable and fair. However, Petitioners' Statement of the Case is incorrect in one

significant regard: Contrary to Petitioners' representations, Respondent does not admit that the Education of the Handicapped Act, 20 U.S.C. §§ 1400 *et seq.* ("EHA")¹ or its Arizona statutory counterpart, A.R.S. §§ 15-761 *et seq.* requires Respondent to provide a sign language interpreter for Petitioner in a private or parochial school.² A reversal of the Court of Appeals decision, therefore, will not dispose of this case.³

In addition, it may be beneficial to describe briefly the school attended by Petitioner. Salpointe Catholic High School is a private Roman Catholic educational institution for young men and women located in Tucson, Arizona and operated under the direction of the Carmelite

¹ Respondent acknowledges Petitioners' note that the Education of the Handicapped Act recently was retitled as the Individuals with Disabilities Education Act. See Petition at p. i. For the sake of conformity, Respondent likewise will continue to use the former "EHA" terminology.

² Although, for the limited purpose of resolving Respondent's motion for summary judgment, Respondent indicated that it voluntarily would pay for a sign language interpreter in a nonsectarian private school, see Respondent's Answering Brief in the Court of Appeals at p. 6, n. 3, Respondent has never agreed that the EHA requires it to do so.

³ The case was decided in the District Court on Respondent's motion for summary judgment, in which the determinative issue was whether the establishment clause prevented Respondent from providing the services of a sign language interpreter at a pervasively religious parochial school. Technically, it never has been necessary to address the issue of whether the EHA or state education statutes require Respondent to provide the requested services on private school grounds. However, should the decision of the Court of Appeals be reversed, these issues would remain to be adjudicated.

Order of the Roman Catholic Church (R.34).⁴ The parties have stipulated that Salpointe is pervasively religious in character; its goal of educating students in a religious atmosphere constitutes an integral part of the religious mission of the Roman Catholic Church; the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe; and, for the purpose of this case, the religious character of Salpointe is not limited in any material manner (R.34-37). It is into this atmosphere that Petitioners demanded that Respondent place a publicly paid employee to facilitate and assist both the religious and educational activities being pursued.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied because the issues raised by Petitioners have been settled in both this Court and the circuits, because the decision rendered in the Court of Appeals is consistent with precedents established by this Court, and because other grounds exist for the denial of the services requested in this case. Accordingly, there are no compelling reasons to grant review.

Rule 10.1, Rules of the Supreme Court, provides that a petition for a writ of certiorari will be granted "only when there are special and important reasons therefore."

⁴ The designation "R. ___" refers to page number(s) in the Excerpts of Record in the Court of Appeals.

Among the situations described in Rule 10.1 where certiorari may be appropriate are when there is a conflict among the circuits; when a decision departs from the accepted course of proceedings; when an important issue has not been settled by this Court; or when a decision conflicts with applicable decisions of this Court. None of these situations applies to the present case. To the contrary, this case presents issues that fall squarely within established precedents. In addition, even if Petitioners could reverse existing precedent, the case still would not be resolved completely in favor of Petitioners. This case therefore does not rise to the level of importance where consideration by this Court would be necessary or appropriate.

I. THERE IS NO DISPUTE AMONG COURTS THAT HAVE DECIDED THIS ISSUE.

The specific question of whether a school district legally may pay for the services of a sign language interpreter in a parochial school has been decided by Courts of Appeals in two circuits. In addition to the Ninth Circuit ruling in the present case, the Court of Appeals for the Fourth Circuit came to the same conclusion, and found that the establishment clause of the First Amendment to the United States Constitution prohibits a school district from placing a sign language interpreter in a parochial classroom. *See Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991). The Ninth and Fourth Circuit decisions are in complete accord. In addition, precisely the same issue presented in this case was

put before this Court by the Plaintiffs in *Goodall* in a petition for writ of certiorari. Certiorari was denied only ten months ago, on October 7, 1991.

There is no compelling or special reason at this time for this Court to consider an issue that has been consistently decided by lower courts, and which this Court very recently decided not to consider. The Petition should be denied.

II. THE DECISION BELOW IS CONSISTENT WITH APPLICABLE PRECEDENTS ESTABLISHED BY THIS COURT.

Certiorari should be denied in this case because Petitioners have failed to demonstrate that the Court of Appeals' ruling is in any manner inconsistent with applicable precedents established by this Court. To the contrary, this Court's precedents support and form the basis of the Court of Appeals' reasoning in the decision below. The individual arguments in the Petition lack merit for the following reasons:

A. Petitioners, highlighting a portion of the dissenting opinion in the Court of Appeals, argue that, to determine whether governmental action has a primary effect that advances or inhibits religion, a court must review the effect of the legislation as a whole, rather than any particular application of the legislation. Petition at p. 6. In other words, Petitioners conclude that, because the EHA as a whole clearly satisfies an establishment clause inquiry, then particular applications of the statute, such as the placement of a sign language interpreter in a parochial

classroom, likewise will satisfy the inquiry. Both Petitioners and the dissenting judge, however, apparently overlook the fact that this Court has specifically approved the review of particular applications of a statute, as well as a statutory scheme as a whole. *Bowen v. Kendrick*, 487 U.S. 589, 601-02 (1988) ("[A]n otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible."). The Court of Appeals properly considered whether the application of the EHA in this case, as requested by Petitioners, would violate existing establishment clause principles.

B. Contrary to Petitioners' suggestion, the Court of Appeals did not improperly expand the "symbolic link" test found in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985). See Petition at pp. 10-11. In *Grand Rapids*, this Court found that public classes conducted on parochial school grounds had the impermissible effect of promoting religion because the governmental presence on school grounds provided a "crucial symbolic link between government and religion, thereby enlisting - at least in the eyes of impressionable youngsters - the powers of government to the support of the religious denomination operating the school." *Grand Rapids*, 473 U.S. at 385. This Court noted that government improperly promotes religion "when it fosters a close identification of its powers and responsibilities with those of any - or all - religious denominations." *Grand Rapids*, 473 U.S. at 389. The Court of Appeals did not improperly expand this analysis; rather, the Court of Appeals simply and correctly concluded that a prohibited symbolic link between government and religion exists when a publicly paid employee

is placed in a parochial classroom and is required to participate in religious as well as educational activities conducted there. If anything, the symbolic link is stronger in this case, since here the public employee actually participates in the religious activities. In contrast, in *Grand Rapids*, the publicly paid teachers pursued only secular teaching activities, with only a risk that religious statements might be made by one or more particular teachers.

The Court of Appeals' finding of an impermissible symbolic link between government and religion in this case likewise is consistent with this Court's recent ruling in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 60 U.S.L.W. 4723 (1992). In *Lee*, this Court concluded that the establishment clause does not permit school officials to invite clergy to offer invocations and benedictions at official public school graduation ceremonies. Because the graduation prayer in *Lee* "bore the imprint of the state" *Lee*, ___ U.S. at ___, 60 U.S.L.W. at 4726, the appearance of a connection between religion and the state, and the possible effect of this connection upon the participants of the ceremony, made the practice unacceptable. If it is objectionable for government to inject a brief religious presence into a graduation ceremony, it is equally if not more objectionable for government to inject its official presence directly into the day to day conduct of a parochial classroom. Stated in another fashion, if this Court's precedents "do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students," *Lee*, ___ U.S. at ___, 60 U.S.L.W. at 4726, then this Court's precedents likewise do not permit a publicly paid employee to assist in the communication and recitation of those prayers.

C. The Court of Appeals decision is consistent with this Court's rulings in *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Department of Services for the Blind*, 471 U.S. 481 (1986), *Bowen v. Kendrick*, 487 U.S. 589 (1988), and *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *Mueller*, *supra*, which involved tax deductions for individuals who pay school tuition, including parochial school tuition, and *Witters*, *supra*, which involved a government grant for tuition provided to a blind student who chose to attend a religious school, do not mandate a different result in the present case. Neither *Mueller* nor *Witters* involved the placement of a public employee in a parochial classroom to communicate, participate in and otherwise facilitate religious teachings. Likewise, in *Bowen*, *supra*, the Court approved legislation funding grants to various organizations for services and research relating to premarital and adolescent sexual relations, but specifically remanded the matter to determine whether funds may be flowing improperly to religious institutions such as parochial schools. *Bowen*, 487 U.S. at 622. Finally, the Court of Appeals' decision is consistent with *Mergens*, *supra*, which involved meetings of religious groups on public school premises. While *Mergens* suggested that, in some cases, government may permit religious activities to occur on its grounds, it also noted that government may not participate in or facilitate those activities. *Mergens*, 496 U.S. at 251. The government conduct requested by Petitioners is much more than simple acquiescence in Petitioners' educational choices; rather, the government is asked specifically to facilitate and participate in Petitioners' religious

education. This Court's precedents cannot be stretched far enough to permit such conduct.

D. Not only is the Court of Appeals' decision consistent with Supreme Court precedents, its result is mandated by precedent. *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), hold that government may not provide instructional resources to parochial schools or to students who attend parochial schools when such resources, in the classroom, could be put to religious use. Instructional materials such as maps, charts, films and projectors, and recording and laboratory equipment, may not be supplied by governmental entities because these items potentially could be subverted to religious purposes and facilitate religious instruction. The provision of these resources was determined to have an impermissible primary effect of promoting religion. Applying the same considerations to the present case, it is apparent that the sign language interpreter not only could be used, but also would be used, to facilitate religious instruction as well as Petitioners' participation in religious activities. In this regard, the sign language interpreter fares no better than the tape recorder in *Meek* or the globe in *Wolman*, and is equally impermissible under the establishment clause. The issue presented by Petitioners, therefore, falls squarely within precedents already established by this Court in *Meek* and *Wolman*.

E. Existing precedents, including those set out in *Meek*, *supra* and *Wolman*, *supra*, need not be reexamined or reconsidered. The present case does not mandate a reevaluation of existing establishment clause principles for several reasons. First, this Court, in its very recent opinion in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 60

U.S.L.W. 4723 (1992), specifically declined to reexamine the criteria and considerations established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Secondly, even if it may be appropriate to take a second look at *Lemon* principles, this is not the case in which to make such an examination. Under any analysis, the use of a publicly paid employee to facilitate religious teaching and conduct cannot be reconciled with the establishment clause. Finally, using this case as a vehicle to reconsider existing precedents may be a futile exercise because other, statutory grounds exist to uphold the Court of Appeals' decision. See Argument, Section III, below.

F. Petitioners' arguments concerning the exclusion of individuals from public welfare benefit programs based on their religion, see Petition at pp. 9-10, is unpersuasive. While the government generally may not inhibit religion, this prohibition does not require, or even permit, the government to support religion in the alternative. *Lee v. Weisman*, ___ U.S. ___, 60 U.S.L.W. at 4725 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the establishment clause.").

It should be noted that Petitioners misread the conclusions reached by this Court in *Employment Division v. Smith*, 494 U.S. 872 (1990), when Petitioners conclude summarily that compliance with the establishment clause may not form a compelling state interest that justifies alleged limitations on the free exercise of religion. See Petition at p. 10. *Smith* says no such thing. To the contrary, *Smith* held only that certain State action, specifically

the enforcement of religion-neutral criminal laws prohibiting the use of peyote, need not be justified by a compelling State interest, even if such laws have the effect of burdening a particular religious practice. *Smith* in no manner affects the validity of the Court of Appeals' conclusion that avoiding a violation of the establishment clause constitutes a compelling state interest that justifies any alleged burden on Petitioners' practice of their religion.

III. OTHER GROUNDS EXIST FOR THE DENIAL OF THE REQUESTED SERVICES IN A PAROCHIAL SCHOOL

Even if Petitioners prevail before this Court and win a ruling that the State's provision of sign language interpreter services in a parochial school does not violate the establishment clause, which should not be the case, Respondents still would not be required to provide the services in a parochial school setting. The EHA, through applicable regulations, requires Respondent to make certain special education services, termed "related services," available to each handicapped student living within its boundaries who decides to enroll in a private school. See 34 C.F.R. § 300.403(a); 34 C.F.R. § 300.452. Federal courts have consistently interpreted these provisions, however, to mean that, while a school district must make certain special education related services (including sign language interpreter services) *available*, these services need not be physically available on the campus of a private parochial school. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363, 367 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991); *McNair v. Cardimone*, 676

F. Supp. 1361 (S.D. Ohio 1987). Rather, it is enough that the special education related services are available to the student on the public school campus. *Id.* Such is the case with Petitioner, who was offered the free services of a sign language interpreter in any public high school in Tucson.

Moreover, 34 C.F.R. § 76.532, part of the Education Department General Administrative Regulations, specifically provides that a school district may not use federal special education monies to pay for worship, instruction or proselytization. 34 C.F.R. § 76.532 provides in part:

- (a) No state or subgrantee may use its grant or subgrant to pay for any of the following:
 - (1) Religious worship, instruction or proselytization.

This regulation has been construed specifically to preclude the school district from paying for sign language interpreter services inside a parochial classroom. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363, 369 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991). The Supreme Court's adjudication of establishment clause issues presented by Petitioners, one way or another, very likely will have no significant impact on the ultimate resolution of this case.⁵

⁵ In the District Court, this case was adjudicated based on Respondent's motion for summary judgment filed solely on federal constitutional grounds. Any reversal would allow Respondent to proceed to trial in order to raise all additional arguments.

CONCLUSION

The presence of a publicly funded state employee in a parochial classroom, communicating, assisting and participating in religious discussions and other sectarian activities, cannot be reconciled with the constitutional requirement that government not participate in the religious education of parochial students. The Court of Appeals decision either is consistent with or falls squarely within applicable precedents established by this Court. The Court of Appeals decision also is in complete agreement with the Fourth Circuit's decision in *Goodall, supra*, which considered this identical issue. In addition, the Court of Appeals opinion is consistent with all applicable federal district court, Court of Appeals and Supreme Court decisions in the First Amendment area. Not a single reported decision would suggest a contrary result.

Given the large body of law governing the establishment of religion in parochial schools, as well as the ease with which this case falls within those principles, this case presents no compelling or important reason to review either the *Lemon* test in general or the Court of Appeals decision in particular. Finally, because EHA regulations concerning Petitioners' entitlement to the requested assistance have yet to be construed in his favor, and very likely would be construed against him, this Court's review of establishment clause issues would have little, if any, impact on the ultimate outcome of this case. For

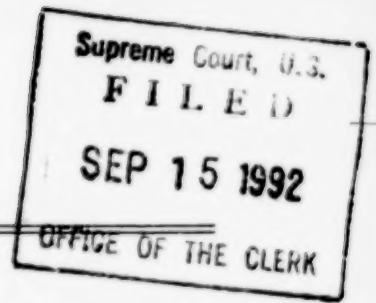
these and the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

JOHN C. RICHARDSON,
(Counsel of Record)

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District*

4
No. 92-94



In The
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Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Counsel for Petitioners

REPLY TO BRIEF IN OPPOSITION

The respondent, in its Brief In Opposition To Petition For Writ of Certiorari (hereinafter, "Br."), presents three principal arguments as to why the writ should be denied: (1) that the EHA did not require respondent to provide services to any handicapped child on the grounds of any private school (hence reversal of the decision below would not dispose of the case) (Br. 3), (2) that there is no dispute among circuits or courts which have considered the constitutional issues presented by this case (Br. 5-6), (3) that the decision below is consistent with Supreme Court precedents (Br. 6-12).

I. JAMES ZOBREST WAS STATUTORILY ENTITLED TO RECEIVE THE INTERPRETER SERVICES REQUESTED.

That was necessarily the conclusion of the majority and minority of the court below. The opinions of neither raised any question of statutory entitlement and saw the sole question in the case to be that posed by the Establishment Clause. The Education For The Handicapped Act has as its express purpose the meeting of the needs of "all" handicapped children (20 U.S.C. § 1400(b)), and its specific provisions are designed to effectuate that purpose. (See 20 U.S.C. §§ 1401(a)(1), (10); 1412; 1413(a)(4)(B); 1413(d); 34 CFR §§ 76.651-76.660; 300.1, 300.2, 300.5, 300.121, 300.124(iii, iv), 300.128(1), 300.341(b), 300.347, 300.348, 300.401, 300.450-300.452.)

At no point since October, 1987, when petitioners applied for the interpreter services, had respondent until now opposed the granting of those services on the basis

of lack of James' statutory entitlement to them. As noted by the court below, it was the stated position of respondent that if "James attended . . . a non-religious private school in Arizona, the Catalina Foothills School District . . . would assume full financial responsibility for the employment of a sign language interpreter for James." (A-4 - A-5.) But nothing in the EHA provided that the local education agency had an option, subjectively exercised, to allow, or to disallow, services to handicapped children on private school premises. As Judge Tang in his dissent stated, the EHA is "a general welfare program providing benefits to all handicapped children, whether they are enrolled in public or private schools." (A-21.)

Therefore it is clear that the issue before the Supreme Court is *solely* whether the providing of an EHA service to a handicapped child on the premises of the religious school he attends was barred by the Establishment Clause. Resolution of that important issue is clearly dispositive of this case.

II. IT IS IRRELEVANT THAT "THERE IS NO DISPUTE AMONG COURTS THAT HAVE DECIDED THE [ESTABLISHMENT CLAUSE] ISSUE."

Respondent asks this Court to deny review on the ground that there is no dispute among courts which have decided the Establishment Clause issue posed by this case. (Br. 5-6.) But the mere absence of a conflict among circuits or other courts on a constitutional question has never been considered a reason for denial of certiorari by this Court. It is obvious that most cases which this Court selects for review are not cases involving such conflicts.

Respondent alternatively states that the Court should deny review herein because two circuits, the Fourth and the Ninth, "are in complete accord." (Br. 5.) While the fact that the two circuits may be in agreement on a particular issue is scarcely determinative of whether certiorari should be granted here, the Fourth Circuit case cited by respondent as being in accord with the decision below (*Goodall v. Stafford County School District*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991)), is, in significant respects, distinguishable. There EHA services were sought for a child enrolled in a non-state-approved school. Here, the school in question is state-approved. There, the providing of services of the public agency, following a private placement by the parents, was denied, on statutory and constitutional grounds, following due process proceedings. Here, subsequent to following the school district's issuance of an IEP for James and determining that he was eligible for EHA help, the state Attorney General terminated the process by his ruling that providing the services on religious school premises was forbidden by the Constitution. The respondent school district thus considered itself barred from placing James in the private school of his parents' choice, referring him to that school, or providing on its premises the EHA services he needed. Finally, *Goodall* was determined under Virginia law as well as by an interpretation of the EHA, and the opinion of the Fourth Circuit on Establishment Clause application was avoidable (and, in petitioner's view, erroneous).

III. RESPONDENT'S CLAIM RESPECTING PRECEDENT DECISIONS OF THE SUPREME COURT DEMONSTRATES THE NECESSITY THAT THE WRIT BE GRANTED

The respondent (Br. 6-12) simply argues the merits of the constitutional issues raised by petitioners. While such argumentation will be entirely appropriate when and if certiorari is granted, its evident effect at the present stage of proceedings is to heavily underscore the importance of plenary review. Petitioners in good faith have raised (as has Judge Tang below and indeed several Justices of this Court) serious questions respecting the reach and meaning of some prior decisions of this Court interpreting the Establishment Clause. Those questions are presented graphically in the matter of James Zobrest, his parents, and the application to him of national child benefit legislation.

CONCLUSION

Respondent's Brief In Opposition serves but to emphasize the importance of the question presented and the need for granting review. Petitioners thus respectfully renew their request that the Petition For Certiorari be granted.

Respectfully submitted,

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AUG 10 1992

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In The
Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST,
husband and wife; JAMES ZOBREST, a minor,
by LARRY AND SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

**BRIEF AMICI CURIAE OF THE CHRISTIAN LEGAL
SOCIETY, THE CHURCH OF JESUS CHRIST OF
LATTER-DAY SAINTS, THE FIRST LIBERTY
INSTITUTE, THE LUTHERAN CHURCH-MISSOURI
SYNOD, THE NATIONAL ASSOCIATION OF
EVANGELICALS AND THE NATIONAL COUNCIL
OF CHURCHES OF CHRIST IN THE USA, IN
SUPPORT OF A PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

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INTERESTS OF AMICI CURIAE

The particular statements of interest of the *amici curiae* are included in Appendix A. The letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 36.2.

REASONS FOR GRANTING THE WRIT

I. Summary of Argument

Although the Petition primarily presents a Question framed in terms of the Establishment Clause of the First Amendment, *amici* wish to point out that the case in fact presents intertwined questions under both the Free Exercise and the Establishment provisions of the Religion Clause, and the relationship between the two. The court below held that for the school district to provide a sign language interpreter to a student in a religious school would violate the Establishment Clause, that to refuse such an interpreter would burden the rights of the student and his parents under the Free Exercise Clause, and that this *prima facie* violation of the Free Exercise Clause was justified by the school district's compelling interest in avoiding a violation of the Establishment Clause. In other words, the Establishment Clause means the opposite of the Free Exercise Clause, and the Establishment Clause predominates where there is a conflict. The purpose of this brief is to explain why the effect of the decision below is to violate petitioner's Free Exercise rights, and to urge this Court to adopt a construction of the Establishment Clause that makes the two components of the Religion Clause of the First Amendment harmonious and internally consistent. Recognition of the

complementarity of the two provisions of the Religion Clause is indispensable to the fulfillment of its singular purpose: protection of the Divinely-conferred, inalienable right to religious exercise. See *Declaration of Independence*, 1 Stat. 1 (1776); J. Madison, *A Memorial and Remonstrance* (1785), para. 1, reprinted at 330 U.S. 1, 64 (1947).

Petitioners have primarily presented the Establishment Clause question to this Court. That question deserves review by this Court, because it is fundamental to the meaning of the Establishment Clause, because it is important to the administration of a federal statute, and because the decision below appears to conflict with this Court's decisions in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), *Mueller v. Allen*, 463 U.S. 388 (1983), and *Board of Education v. Everson*, 330 U.S. 1 (1947).

These *amici* believe that the Establishment Clause question cannot be separated from the Free Exercise Clause question, and certainly not from the question about the relationship between the two clauses. See Petition for Certiorari at 9-10 and note 9, arguing that the judgment below inhibits religion in violation of the Establishment Clause and expressly discriminates against religion in apparent conflict with this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* is not cited below, perhaps because briefing was completed before *Smith* was decided. Petition at 4.

Assuming that there were some plausibility to the lower courts' fear of an Establishment Clause violation, the ultimate question would be whether avoidance of an Establishment Clause violation justifies a Free Exercise

Clause violation. If the conflict were truly unavoidable, it would be equally logical to hold that avoidance of the Free Exercise Clause violation justifies the Establishment Clause violation. The decision below appears to assume, without analysis, that the Establishment Clause is a trump card that overrides other First Amendment rights. That holding conflicts with the decision *en banc* in *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992), and is in tension with this Court's decisions in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981).

In this case, as in *Mergens* and *Widmar*, the Court must construe each clause of the First Amendment in light of the others. When a court finds a direct conflict between the clauses, as in the court below, that is a strong warning that one of the clauses has been misinterpreted. This Court must consider the Establishment issue in light of the Free Exercise issue and the larger issue of the relationship between the two components of the Religion Clause. Given the importance of these questions, and the significant impact on the religious liberty of all disabled children and their parents, *amici* believe that this Court should grant review.

II. The Court Should Decide Whether the District's Policy Violates the Free Exercise Clause.

A. The District's Policy Expressly Discriminates Against Religion.

Respondent is candid about its decision to discriminate against religion – it admits that if James Zobrest's parents "enrolled him in a non-sectarian private school or

public school" it would provide a sign language interpreter for him. *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d 1190, 1192 n.1 (9th Cir. 1992), Pet. App. A5 n.1. In its decision below, the Ninth Circuit correctly concluded that this discriminatory policy imposes a burden on Petitioners' free exercise of religion. *Id.* at 1196, Pet. App. at A14. Yet the court was singularly unconcerned about the legal implications of a burden on petitioner's constitutional rights. It simply elevated Establishment considerations over Free Exercise rights, without serious analysis of the latter.

It is important at the outset to make clear that these *amici* are not suggesting that the district would be unconstitutionally discriminating against religion if it paid for interpreters in public school but refused to pay for interpreters at any private school. In that case, the distinction would be between public and private, which is a presumptively legitimate basis for distinction. The distinction here is between schools with secular educational content (whether public or private) and schools with religious educational content. That distinction - a discrimination against religion and in favor of the secular - is not permissible.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that although religiously-motivated behavior may be burdened by a "neutral law of general applicability", *id.* at 879, governmental action is subject to the compelling interest test if it overtly discriminates against religion or otherwise falls short of neutrality or general applicability.

In three separate formulations, each approaching the problem from a slightly different perspective, this Court in *Smith* insisted on neutrality and general applicability. First, *Smith* says a law is unconstitutional if it singles out religion for discriminatory treatment. The Court noted that government may not "impose special disabilities on the basis of religious views or religious status." *Id.* at 877. Further, it is unconstitutional for a state to prohibit or otherwise burden certain "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Id.* By its own admission, Respondent is guilty of this forbidden religious discrimination. Although it provides sign language interpreters to hearing-impaired students in public schools and in private nonreligious schools, it has refused to provide an interpreter to James Zobrest for one reason only - because his parents have chosen to enroll him in a private religious school. Under *Smith*, such overt religious discrimination is unconstitutional.

Second, a government policy is subject to strict scrutiny under *Smith* if it is "specifically directed at . . . religious practice." *Id.* at 878. For example, a tax on persons who regularly attend church would violate the Free Exercise Clause under this approach, because it is directed at religious practice and therefore is not generally applicable. *Id.* The policy at issue here is economically equivalent to a tax on attending church: the school district imposes a financial forfeiture on those who attend religious schools. The district provides a benefit to disabled children attending private secular schools but withholds that benefit from children attending private religious schools. Both the hypothetical tax and the actual

forfeiture of benefits are economic penalties "specifically directed" at religious practice. Imposing the tax would discourage church attendance; withholding the benefit will discourage enrollment in religious schools. See McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U.Chi.L.Rev. 1, 5 (1989). Under *Smith*, these specifically directed economic penalties on religious practices violate the Free Exercise Clause.

Third, *Smith* holds that if a governmental benefit depends upon the actor's motives, religious motives must be included among the motives that qualify for the benefit. 494 U.S. at 884. This was the Court's rationale for reaffirming the line of unemployment compensation cases beginning with *Sherbert v. Verner*, 374 U.S. 398 (1963).¹ The states in those cases had accepted some reasons for quitting employment, but had denied benefits to persons who had quit for religious reasons. Similarly, Respondent in this case provides an interpreter to students whose families have chosen public education or private nonreligious education, but denies the same benefit to religiously motivated families who choose religious schools for their children. As in *Sherbert*, this policy "forces [Petitioners] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order [to obtain generally available benefits], on

¹ Accord, *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987); *Thomas v. Review Board, Indiana Employment Security Div.*, 450 U.S. 707 (1981).

the other hand." 374 U.S. at 404. Under *Smith*, this governmental scheme lacks religious neutrality and thus is unconstitutional.

The three formulations are mutually reinforcing elements of the requirement in *Smith* that government be neutral toward religion. A government policy is invalid if it overtly discriminates against religion, if it is "specifically directed" at religious practices, or if it treats religious reasons for acting less favorably than secular reasons for acting. The Respondent's discriminatory policy in this case violates all three formulations of neutrality.

B. The District's Policy Violates the Parents' Hybrid Right to Free Exercise in the Context of Directing the Religious Education of Their Children.

In *Smith* this Court recognized another class of Free Exercise claims that continue to be reviewed under the compelling interest test. The Court referred to these cases as "hybrid" cases involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. *Smith* says that hybrid claims will be recognized in at least three circumstances: when a Free Exercise claim is linked to a claim based upon the right of parents to direct the education of their children as recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972); when a Free Exercise claim is linked to a Free Speech or Free Press claim; when a Free Exercise claim is linked with a freedom of association claim. *Smith*, 494

U.S. at 881-82. If a Free Exercise claim is combined with a claim arising out of any one of these three categories, the litigant has a hybrid claim and is entitled to strict scrutiny of government actions that burden it. *Id.*

It is clear that if any Free Exercise claim is a hybrid, Petitioners' claim must be one. Their Free Exercise claim is reinforced by: 1) a parental rights claim, 2) the Free Speech claim that the State may not "contract the spectrum of available knowledge"² by restricting educational alternatives such as private religious education, and 3) the freedom to choose the classmates and teachers with whom Petitioner James Zobrest will associate during instructional time. Petitioners' claim is a cord of at least four strands, and should be entitled, as a *Smith*-hybrid, to the protection of the compelling interest test.

In *Pierce v. Society of Sisters*, this Court struck down an Oregon law that required most children between the ages of eight and sixteen to attend public school. 268 U.S. at 530-31. The Court held that the Oregon legislation unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The unanimous opinion of the Court in *Pierce* recognized this parental right to choose either public or private education for their children as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 535. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923). The leading modern case recognizing this parental right is *Wisconsin v. Yoder*, in which the Court noted that the "primary role

² *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. at 232.

Smith reaffirmed both *Pierce* and *Yoder* and cited them as examples of hybrid cases in which a Free Exercise claim is linked to a parental rights claim. 494 U.S. at 881. The instant case is a perfect example of this type of *Smith*-hybrid. Petitioners' Free Exercise claim is inextricably intertwined with their claim to direct the education of their children by choosing a private religious school. Respondent's policy of granting sign language interpreters to hearing-impaired children attending public schools or private nonreligious schools, while denying an interpreter to families choosing private religious education, violates Petitioners' hybrid constitutional claim and must be reviewed under strict scrutiny.

Petitioner's hybrid claim is reinforced by free speech and association interests. The sole basis for distinguishing between the school he chose to attend and other private schools, in which he would have received the assistance of a state-funded interpreter, was the content and viewpoint of the speech that takes place at the school. A private school devoted to progressive politics, feminism, militarism, or Afrocentrism would have been approved; a school infused by religious values was not approved. This is a plain instance of discrimination on the basis of the content of speech - indeed, even of the viewpoint of speech. Petitioner's school covered the same subjects as schools that would have been approved, but it did so from a different perspective.³ This Court has

³ Even religion is deemed to be an appropriate subject for secular curriculum so long as it is presented from the

(Continued on following page)

condemned such content discrimination in the strongest of terms. See *R.A.V. v. City of St. Paul*, No. 90-7675 (June 22, 1992); *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). This Court has condemned content-based discrimination of speech even when the speech is religious (see *Widmar v. Vincent*, 454 U.S. 263 (1981)) and even when the issue is the grant or denial of subsidies, rather than the administration of regulation. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). *Widmar* upheld neutral access to governmental facilities and resources by non-government speakers. This Court has the same opportunity in the instant case to clarify the complementarity between Establishment and Free Exercise principles in the context of a program providing similar indirect facilitation (equal access to sign language interpreters) of private religious speech.

The instant case also presents the scenario, envisioned by *Smith*, "in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." 494 U.S. at 882. As this Court noted in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984):

An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . .

(Continued from previous page)

viewpoint of a dispassionate outsider rather than a believer. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963).

According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.

Id. at 622. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). By singling out disabled children attending private religious schools for discriminatory denial of benefits, Respondent has infringed Petitioners' hybrid claim. Therefore, Respondent's policy is subject to compelling interest analysis under *Smith*.

III. The Decision Below Elevates the Establishment Clause Over the Rest of the First Amendment, and Thus Conflicts with Decisions of this Court, the Court of Appeals for the Seventh Circuit, and the Congress.

The court of appeals held that the district's policy burdens Petitioner's free exercise rights and that the policy can be justified only by a compelling interest. 963 F.2d 1196-97, Pet. App. A13-A15. It found such an interest in the desire to avoid a violation of the Establishment Clause. *Id.*, Pet. App. at A14-A15. This holding is announced in a single conclusory paragraph.

If we accept the court of appeals' reasoning up to the beginning of that paragraph, a question of exquisite difficulty is presented. The court of appeals held that providing the sign language interpreter *prima facie* violates the Establishment Clause, and that withholding the interpreter *prima facie* violates the Free Exercise Clause. What to do in the face of this conflict?

The court of appeals simply picked its favorite clause, and announced that one clause justified a violation of the other. But the court could, with equal logic, have announced that the other clause justified a violation of the first. See Laurence Tribe, *Constitutional Law*, Sec. 14-4, at p. 1168 (2d ed. 1988) [arguing that actions "arguably compelled" by the Free Exercise clause "are not forbidden by the (E)stablishment (C)lause"]. The court of appeals apparently assumed that the Establishment Clause is a trump, and that it overrides the rest of the First Amendment.

As it happens, the Seventh Circuit was simultaneously considering a similar issue involving an alleged conflict between the Establishment Clause and the Free Speech Clause. *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992). That court accepted the district court's unappealed judgment that a city had violated the Establishment Clause by endorsing a display of religious paintings in the city park. *Id.* at 617. But it held that this assumed Establishment Clause violation did not justify an injunction overriding the free speech rights of a private association that wanted to display the paintings in its own name.

Judge Easterbrook's concurring opinion captured the essence of the issue most succinctly. *Id.* at 629-30. We draw on his analysis, substituting the facts of this case for the facts of his. This analysis focuses on the relationship among two rules developed by this Court under the First Amendment and a third one added by the Court below:

Rule 1: Under the Establishment Clause, government may not act in a way which has the primary effect of advancing religion.

Rule 2: Under the Free Exercise Clause, government may not single out religion for discriminatory treatment or burden a hybrid claim linking free exercise to another constitutional interest.

Rule 3: (the Ninth Circuit's rule here): To avoid violating Rule 1, government may violate Rule 2.

As Judge Easterbrook stated when discussing this problem in *Doe v. Small*, "the Constitution neither creates nor tolerates Rule 3." 964 F.2d at 629. (Easterbrook, J. concurring).

The Seventh Circuit and the Ninth Circuit could not be further apart on this issue. The Ninth Circuit appears to believe that the constitution grants a position of absolute priority to the Establishment Clause which justifies a violation of the Free Exercise Clause. *Zobrest*, 963 F.2d at 1196-97, Pet. App. A14-A15. See also *Goodall By Goodall v. Stafford County School Board*, 930 F.2d 363, 370 (4th Cir. 1991). In *Doe v. Small*, however, the Seventh Circuit, citing *Widmar v. Vincent*, 454 U.S. 263 (1981), held that the state's obligation to avoid an Establishment Clause violation does not justify restricting the Free Exercise and Free Speech rights of private litigants. 964 F.2d at 618-19. This Court should resolve the split among the circuits by granting Petitioner's prayer in this case and rejecting the Ninth Circuit's rule of absolute preeminence for the Establishment Clause.

This Court addressed similar claims of conflict between the Establishment Clause and religious speech in *Board of Education v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981). This Court did not indulge the Ninth Circuit's assumption that one clause of

the First Amendment trumps the others. Rather, in *Widmar* it construed the clauses in light of each other, and held that government satisfies the First Amendment when it treats religion with neutrality, neither discriminating in favor of religion or against religion. *Mergens* and *Widmar* hold that there is no violation of the Establishment Clause when religious speech is given equal access to a public forum, and *Widmar* expressly rejects the claim that a more hostile interpretation of a state establishment clause can be a compelling interest that justifies a violation of the Free Speech Clause. 454 U.S. at 275-76.

This Court has also addressed alleged conflicts between the Establishment and the Free Exercise components of the Religion Clause. The Court rejected the claim that the Establishment Clause precludes exemptions for religiously motivated conduct, *Employment Division v. Smith*, 494 U.S. 872, 890 (1990); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), even though *Smith* interprets the Free Exercise Clause not to require such exemptions.

These cases suggest the proper line of analysis here. Neither of the components of the Religion Clause is a trump card. Instead, the interests on both sides must be weighed with a view toward minimizing governmental impact on private religious choices. In other words, as this Court held in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973), the state must "maintain an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion." See also *id.* at 792-93 ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.")

A conflict between the Establishment and the Free Exercise provisions is best avoided by holding that government assistance provided on an equal basis to all disabled students (including disabled students enrolled in private religious schools) does not violate the Establishment Clause. The Establishment Clause issue is adequately set forth in the Petition for Certiorari, and we will not review the whole argument here. We would emphasize two points. First, the Establishment Clause issue is virtually indistinguishable from *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). The biggest difference between the cases makes this one even simpler: *Witters* sought religious training for employment as a minister, but Petitioner here received education in secular subjects that satisfied the state's compulsory education requirements. Second, in *Witters* and *Mueller v. Allen*, 463 U.S. 388 (1983), this Court relied on the fact that direction of public funds to a religious school depended wholly on the private choices of individual students and their parents. That is also true here. The state's check might have gone directly to the interpreter instead of to the parents, as the court of appeals emphasized, 963 F.2d at 1195, but that is an irrelevant formality. The important point is that the state does not choose the school. Petitioners' choice of a religious school was wholly private.

But even if this Court concludes that such even-handed aid advances religion, it is our position that the advancement is incidental, at most *de minimis*, and is outweighed significantly by Petitioners' free exercise interest. See Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993,

1011-18 (1990). Because the Congress has determined that all hearing-impaired students (of whatever faith and whether they attend public or private school) are entitled to an interpreter, it is impossible for the government aid to influence anyone's private choices concerning religion. The aid merely eliminates the cost of the interpreter as a factor in choosing where to attend school. It reduces the effect of disability as a constraint on free choice. However, Respondent's decision to deny interpreters to children attending private religious schools, while providing interpreters to children attending public or private non-religious schools, sharply discourages religion in violation of the Free Exercise Clause. See McConnell & Posner, *supra*, 56 U.Chi.L.Rev. at 5 (observing that religious behavior contracts when government subsidizes substitute activities).

To summarize our analysis, by providing interpreters only to children attending nonreligious schools, the district has created a substantial disincentive for parents to choose religious education for hearing-impaired children. However, extending benefits to all hearing-impaired children has, at most, a *de minimis* effect on the religious choices of parents. It follows, therefore, that the Free Exercise burden in the instant case outweighs the Establishment Clause interest, and that the district is without a compelling justification for its discriminatory policy.

Even assuming *arguendo* that Respondent has a compelling interest in avoiding a mistaken perception of a symbolic endorsement of religion, it has not narrowly tailored its policy to achieve that interest without unnecessarily burdening Petitioners' constitutional rights. For

example, Respondent could eliminate any mistaken perception of endorsement by disclaimer and by explaining our society's commitment to equal educational opportunity and religious tolerance to students and parents through announcements, memoranda, and posted notices. Therefore, there was no need to adopt the more restrictive alternative of denying much needed assistance to handicapped students enrolled in private religious schools. The Ninth Circuit's cavalier attitude toward this Court's least restrictive means test is yet another reason why this case merits review.

Finally, respondent's asserted compelling interest also contradicts and frustrates the clear policy of Congress to assure the educational needs of *all* handicapped children, including specifically handicapped children "who are enrolled in private elementary and secondary schools." 20 U.S.C. §§ 1400 (Pet. App. A37), 1413(a)(4)(A) (Pet. App. A51); 34 C.F.R. §§ 300.341(b) (Pet. App. A97), 300.347 (Pet. App. A102), 300.348 (Pet. App. A103), 300.401-300.480 (Pet. App. A103-A105); and 34 C.F.R. §§ 76.650-76.662 (Pet. App. A67-A71). The Ninth Circuit was far too quick to usurp the prerogatives of coequal branches of the national government by brushing aside these carefully formulated policies of Congress and their implementation by the Executive Branch.



CONCLUSION

For many years, the jurisprudence of the Religion Clause has been plagued by a "tension" between the interpretation of its two components. *See Thomas v. Review Bd.*, 450 U.S. 707, 720-22 (1981) (Rehnquist, J., dissenting). This case is a textbook example. The court of appeals and the State of Arizona seek to protect the "separation between church and state" by discriminating against a deaf boy on account of his family's religious choices, thereby creating a clear conflict with the Free Exercise Clause. This makes nonsense of the work of the framers, which was to provide a coherent and comprehensive protection for religious freedom against the dangers of both a hostile state and an established church. This case presents an ideal opportunity for this Court to resolve the "tension" between the clauses and restore the First Amendment to a consistent and harmonious whole.

For all of the foregoing reasons, *amici* urge the Court to grant the Petition.

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APPENDIX A

The Christian Legal Society is a nonprofit professional association, founded in 1961, with a present membership of 4,500 Christian judges, attorneys, law professors and law students. Concerned about our First Freedom, it founded the Center for Law & Religious Freedom in 1975 to protect and promote the religious liberty of all persons through advocacy and education. Both in this Court and in state and federal courts throughout the country the Center has advocated for the free exercise of religion as a fundamental and inalienable human right, and it has vigorously opposed governmental discrimination or preference on the basis of religion.

The Christian Life Commission is the moral concerns and public policy agency for the Southern Baptist Convention, the nation's largest Protestant denomination, with over 15 million members in nearly 38,000 local churches. The Christian Life Commission also has an assignment from the Convention to address matters of religious liberty.

The Church of Jesus Christ of Latter-Day Saints ("the LDS Church") is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 7 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what

they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-Day Saints.

First Liberty Institute [FLI] at George Mason University is a non-profit educational institute established to promote principles of religious liberty and civic responsibilities in American education. In the spirit of the Williamsburg Charter, FLI affirms and encourages the civic framework of religious liberty - rights, responsibilities, and respect - as common core values essential for good citizenship. FLI works to secure the strongest possible protection for religious liberty, our nation's first liberty undergirding all other rights and freedoms guaranteed by the Bill of Rights.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf on its congregations, schools, and individual members, is concerned with situations in which individuals' freedom to exercise their religious preference and parents' rights to direct the religious upbringing and education of their children are infringed, such as in the instant case.

The National Association of Evangelicals [NAE] is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74

denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The National Council of the Churches of Christ in the USA is a community of communions composed of thirty-two national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members selected by its member communions in proportion to their size and support of the Council. The Council does not claim to speak for all of its adherents but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the General Board.

Among these policies was a historic resolution "On Federal Aid to Education" that helped to shape the "church-state settlement" that made possible the enactment of the Elementary and Secondary Education Act of 1965. It endorsed the "child-benefit" theory underlying *Everson v. Board of Education* (1977), thus permitting certain kinds of aid to flow to children attending parochial schools. That Act was amended in committee to incorporate certain restrictions designed to insure that the aid benefitted *children* rather than the *schools* they attended. Those amendments were informally referred to by members of Congress as the "Flemming Amendments" because they were suggested by the President of the NCC, Arthur C. Flemming, in testimony based on this resolution.

The limitations in the resolution, designed to keep the "child-benefit" concept from being completely opened, were as follows:

1. That benefits intended for all children be determined and administered by public agencies . . .
2. That such benefits intended for all children not be conveyed in such a way that religious institutions acquire property or the services of personnel thereby.
3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching of sectarian doctrine; and
4. That there be no discrimination by race, religion, class or natural origin in the distribution of such benefits.

The relief sought in this brief would seem to meet these criteria, with the possible exception of No. 3, which would stipulate that the sign-language interpreters supplied by the public school district not be involved in the teaching of religion.

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No. 92-94

IN THE
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, ET AL.,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT
ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE ALEXANDER GRAHAM BELL
ASSOCIATION FOR THE DEAF,
AS AMICUS CURIAE IN SUPPORT
OF PETITIONERS**

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Interest of the Amicus Curiae

The Alexander Graham Bell Association for the Deaf (AGBAD) is an organization comprised of persons who are hearing-impaired and of parents, professionals and other persons having an interest in the welfare of hearing-impaired individuals. The mission of AGBAD is to empower persons who are hearing-impaired to function independently by promoting universal rights and optimal opportunities for such persons, from infancy through adulthood, to learn to use, maintain, and improve all aspects of their verbal communication, including their abilities to speak, speechread, use residual hearing and process both spoken and written language.

AGBAD strongly supports the purposes and precepts of the Individuals With Disabilities Education Act (formerly known as the Education for All Handicapped Children Act or the EHA), which was enacted to ensure that

all disabled children are provided with a free appropriate education in the least restrictive environment possible. The least restrictive environment concept is particularly important to the members of AGBAD, whose primary goal is to ensure that deaf children become fully participating members of mainstream society.

AGBAD's interest in this case is to ensure that deaf children are not denied the right to receive an appropriate education for lack of technological assistance and services necessary to allow them to understand and process the spoken word.

Issue Presented

Does a state's provision of an interpreter (analogous to a typist who types the spoken word for the benefit of a reader) to enable a profoundly deaf student in a parochial school to obtain the free appropriate education required by the Individuals With Disabilities Education Act violate the Establishment Clause of the First Amendment?

Summary of Argument

This *amicus* brief has three purposes: *First*, to explain briefly the nature and responsibility of an interpreter for a deaf individual and the manner in which that interpreter operates. *Second*, to acquaint the Court with some of the severe practical consequences of affirming the majority's opinion below. *Third*, to explain the purely secular purpose that many deaf children have in obtaining the vital individualized attention typically offered them in private schools (both parochial and non-parochial).

Argument

I. The Nature and Function of an Interpreter

Deaf people utilize a variety of assistive devices and services to enable them to understand the spoken word. Some deaf people have enough residual hearing that they are able to benefit from hearing aids and/or assistive listening devices, such as FM systems, induction loops and infrared systems (which allow some hearing-impaired people to understand the spoken word in settings such as courtrooms, conference and meeting rooms, auditoriums and classrooms).

Those deaf people who do not have sufficient residual hearing to benefit from auditory devices must rely on visual means of communication. One means of visual communication is real-time captioning. A specially trained typist, similar to a court reporter, types everything that is said verbally, and the typed word is produced on either a computer-size or movie-size screen. Deaf people who do not know sign language (and thus cannot utilize a sign language interpreter) and are not sufficiently expert speechreaders to enable them to benefit from an oral interpreter¹ sometimes utilize this means of communication when trained personnel and equipment are available.

A second means of visual communication is the use of sign language or oral interpreters. For some deaf people, the use of interpreters is the most practical and efficient (and frequently cost-effective) means of understanding

¹ An oral interpreter mouths the words of a non-speechreadable speaker without using any voice. The deaf person reads the mouth movements of the interpreter rather than of the speaker (who may be too far away to speech-read, out of the deaf person's line of vision, moving around, have a moustache, accent or overbite that prevents speechreading, or simply not move his or her mouth enough to make speechreading feasible).

the spoken word, particularly in a classroom setting, where it is necessary to eliminate any "lag time" so that the deaf person may himself participate in classroom discussion.² An interpreter, like a real-time captioner, is a human being who performs the simple, mechanical function of conveying the spoken word to a deaf person. The interpreter simply repeats what the speaker is saying in a form that is possible for the particular deaf person to understand.

As Judge Tang noted in his dissenting opinion in this case, the majority of the Ninth Circuit correctly refrains from holding "that the First Amendment would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student."³ Nor would the majority of the Ninth Circuit hold that a state's provision of real-time captioning *equipment* for a parochial school student would violate the First Amendment. For the same reason, a state's provision of a *typist* to type the information into real-time captioning equipment could not properly be regarded as violative of the First Amendment. To hold otherwise, simply because the *equipment* is non-human and the *typist* is human, would make no sense in terms of the underlying purpose of the requirement of separation of church and state.

An interpreter provides an identical function to that provided by a typist who types the spoken word into real-

² The term "lag time" is used to denote the time that elapses between the moment a word is spoken and the moment that word is conveyed to a deaf listener via real-time captioning or an interpreter. The lag time is much greater when real-time captioning is utilized because it takes much longer to type what is being stated than to sign or mouth what is being stated. Thus, for example, a deaf professor will utilize an interpreter in the classroom to interpret student comments and questions; because the lag time is minimal the professor is able to respond immediately to the student.

³ 963 F.2d at 1201 (Tang, J., dissenting).

time captioning equipment. Both the typist and the interpreter are responsible for conveying the spoken word to a deaf recipient in a mode of communication that the deaf person can best understand. Just as a state's provision of a real-time captioner (typist) for a deaf parochial school student should not be held to violate the First Amendment, a state's provision of an interpreter for such a student should not be held to violate the First Amendment.

II. The Severe Practical Consequences of the Majority's Decision Below

Mainstreaming⁴ is the ultimate goal sought by many parents and educators of disabled children (and by many older disabled children themselves). Mainstreaming is viewed by such parents, educators and students as a crucial means of preparing a disabled child to be a fully functioning, participating member of the larger non-disabled society. Indeed, mainstreaming underlies the basic precept of the Individuals With Disabilities Education Act,⁵ which requires that every disabled child be provided with a free appropriate education⁶ in the least restrictive environment possible.⁷

⁴ The term "mainstreaming" is used in this brief to denote the practice of placing a disabled child in a "regular" classroom with non-disabled students, rather than in a special classroom or program for disabled students.

⁵ 20 U.S.C.A. §§ 1400-1485 (West Supp. 1991). Prior to 1991 amendments, the Individuals With Disabilities Education Act was entitled the Education for All Handicapped Children Act, and was commonly called the EHA or the EAHCA. The opinions below refer to the earlier title.

⁶ See 20 U.S.C.A. § 1401(a)(18) (West Supp. 1991).

⁷ See 34 C.F.R. § 300.550 (1988). For a discussion of the least restrictive environment concept and how mainstreaming fits within that concept, see Tucker, B. and Goldstein, B., *Legal Rights of Persons With Disabilities: An Analysis of Federal Law* (LRP Pub. 1990), pp.12:11-12:12.

Mainstreaming, however, poses special difficulties for deaf children. Because of their severe communication difficulties, deaf children have serious academic difficulties.⁸ Deaf children also encounter serious social problems in mainstream settings, again the result of their substantial communication difficulties.⁹ Both the academic and social difficulties of deaf school children are greatly alleviated by placement in small, structured classroom settings and participation in programs that provide individual attention from teachers and other support personnel. Frequently, however, these educational advantages are not available in public schools, particularly at

⁸ See, generally, Commission on Education of the Deaf, *Toward Equality: Education of the Deaf*, U.S. Government Printing Service, Washington, D.C., February 1988; Adkins, Dale V., Ed., "Families and Their Hearing Impaired Children," *The Volta Review*, Vol. 89, No. 5, Alexander Graham Bell Association for the Deaf, September 1987 (hereafter "Families and Their Hearing Impaired Children"); Chorost, S., "The Hearing Impaired Child in the Mainstream: A Survey of the Attitudes of Regular Classroom Teachers," *The Volta Review*, Vol. 90, No. 1, Alexander Graham Bell Association for the Deaf, January 1988; Cohen, O.P. and Long, G., "Selected Issues in Adolescence and Deafness," *The Volta Review*, Vol. 93, No. 5, Alexander Graham Bell Association for the Deaf, September 1991 (hereafter "Selected Issues in Adolescence and Deafness"); Froehlinger, V.J., Ed., *Today's Hearing Impaired Child: Into The Mainstream of Education*, Washington, D.C., Alexander Graham Bell Association for the Deaf, 1981; Saur, R., Popp-Stone, M.J. and Hurly-Lawrence, E., "The Classroom Participation of Mainstreamed Hearing-Impaired College Students," *The Volta Review*, Vol. 89, No. 6, Alexander Graham Bell Association for the Deaf, October/November 1987; Vodehnal, S.K., *They Do Belong: Mainstreaming the Hearing Impaired*, Denver, Colorado, The Listen Foundation, 1981; Webster, A. and Elwood, J., *The Hearing Impaired Child in the Ordinary School*, Dover, New Hampshire, Croom Helm, 1985.

⁹ See, generally, Higgins, Paul C., *The Challenge of Educating Together Deaf and Hearing Youth, Making Mainstreaming Work*, C.C. Thomas, Pub., 1990, pp. 1-13, 108-09; Selected Issues in Adolescence and Deafness, *supra* note 8; Oberkotter, M.L., Ed., *The Possible Dream: Mainstream Experiences of Hearing-Impaired Students*, Washington, D.C., Alexander Graham Bell Association for the Deaf, 1990.

the junior high school and high school levels. As one commentator has noted:

On the junior and senior high school levels . . . schools are organized differently [than elementary schools]. Many secondary schools are quite large, due in part to school districts regionalizing on this level. Administrators and staff have many more students to think about than a single child with a hearing loss. Large class size introduces a feeling of anonymity among the students, making it more difficult for teachers to get to know students individually. The schools have rotating classes; teachers customarily deal with six or seven large groups of students during the course of a day, each group for a limited period of time. This can result in the teachers having a fragmented view of their students. Further, these teachers believe their job is beyond that of teaching basic skills; many use a narrow range of methods in teaching their particular subject specialty. Their basic approach is group rather than individual instruction. Independent learning is a priority, with greater competition among students. These conditions make secondary level mainstreaming [of deaf children] more challenging.¹⁰

Because of the grave difficulties experienced by deaf children in mainstream settings where the environment is not structured appropriately to meet the unique needs of students who are unable to hear, parents of deaf children frequently place such children in smaller private schools where they are able to receive greater individual attention, and where there is a greater likelihood that they will

¹⁰ Families and Their Hearing Impaired Children, *supra* note 8, p.124.

adapt socially. In a smaller, more structured setting, teachers are able to assist deaf children in making friends and participating in school activities; deaf children are not subject to as much teasing and abuse from unsupervised students; and deaf children are less likely to be unduly influenced by harmful peer pressure due to feelings of profound isolation and the consequential frantic need to belong "somewhere."

To assist parents in meeting the expense of such private placement, AGBAD offers numerous scholarships each year to deaf children who attend private schools. During the years 1990, 91 and 92, for example, AGBAD granted 161 such scholarships to deaf children throughout the United States. Of those 161 scholarships, 119 were awarded to children in parochial schools. Parochial schools are frequently selected as the educational institutions of choice by parents requesting AGBAD scholarships for their deaf children for two reasons: one, because in some cases a parochial school is the only private school available in the community in which the family resides; two, because the tuition at a non-parochial private school in that community is often so high that it is beyond the family's financial means, even with the assistance of an AGBAD scholarship.¹¹ Parents consistently state the strong need to send their deaf children to private schools for the reasons cited above. To most of those parents,

¹¹ See, e.g., Alexander Graham Bell Association for the Deaf, 1992 *Financial Aid Award Applications*, Question C, p. 4, Washington, D.C., 1992. The question asked is: "State reasons for selecting this educational setting." The reasons cited in this brief for parental decisions to send their deaf children to private schools, both parochial and non-parochial, are the reasons most commonly stated in response to this question.

whether the private school is a parochial school or a non-parochial school is irrelevant.¹²

If deaf children are to benefit from the structured educational environment that many of them require, it is imperative that they be provided with necessary technological and support services to allow them to understand and process the spoken word. In many cases those technological and support services might take the form of amplification devices; in a few cases such services might take the form of real-time captioning or interpreters. The form of the required service should play no part in the determination of whether the state may provide that service in a parochial school that may offer the only appropriately structured educational setting available for a particular deaf child. If the majority's opinion below is affirmed, the result will be to deny some deaf children an education best calculated to serve their unique and pressing needs.

III. The Primary Effect of Providing Interpreters is Not to Advance Religion but to Facilitate the Education of Deaf Children

A statute challenged under the Establishment Clause will be upheld if (1) it has a secular purpose; (2) its primary effect neither advances nor inhibits religion; and (3) the statute does not foster an excessive government entanglement with religion. *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). The court below unanimously ruled that the IDEA had a valid secular purpose (963 F.2d 1191, 1193-94; *id.* at 1197-98 (Tang, J., dissenting)), but a majority of the

¹² It is important to note that AGBAD is not criticizing the public school system, or suggesting that private schools are superior to public schools. AGBAD is merely explaining that, in some cases, private school placement may be the appropriate placement for deaf children.

court found that the primary effect of the IDEA's provision of interpreters to children attending parochial schools was to aid religion.¹³ The majority believed that the presence of an interpreter employed by the state in a parochial school creates the "symbolic union" between church and state found impermissible by this Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

For the reasons stated by Judge Tang, we submit that the majority erred in holding that supplying deaf children who attend parochial schools with interpreters runs afoul of the "effects" prong of the *Lemon* test. As Judge Tang points out, the majority erroneously focused on the specific use to which the aid would be put to in this case rather than on whether the program as a whole would have the primary effect of advancing religion. See 963 F.2d at 1198, citing *Witters v. Washington Services for the Blind*, 474 U.S. 481, 487-88 (1986). Moreover, as Judge Tang states, the fear that neutrally providing interpreters to all deaf children, including those who attend parochial schools, would create a "symbolic union" between church and state is chimerical. See 963 F.2d at 1201.

The majority below has also misread this Court's opinion in *Grand Rapids*. The aid at issue in *Grand Rapids* — public school teachers offering supplementary classes at the parochial schools, and salary supplements for parochial school teachers for teaching additional classes after hours in parochial school buildings — was made to the parochial schools or parochial school teachers and benefited the parochial schools by relieving those religious

¹³ The majority did not reach the question of excessive entanglement, but, as Judge Tang demonstrated in his opinion below, "the church/state contacts involved in supervising a sign language interpreter's job performance are sufficiently contained and abbreviated to prevent excessive entanglement." 963 F.2d at 1204 (Tang, J. dissenting).

institutions of costs they would have otherwise incurred. 421 U.S. 365-66. In contrast, the provision of the interpreter is made directly to a deaf child, and does "not relieve the [parochial school] of any preexisting financial or educational obligation." 963 F.2d at 1200 (Tang, J., dissenting). Moreover, unlike the aid in *Grand Rapids*, which was targeted solely to private schools, almost all of which were sectarian (473 U.S. at 349), under the IDEA deaf children are supplied with interpreters regardless of the type of school they attend.

Thus, far from the massive infusion of aid to the parochial schools at issue in *Grand Rapids*, the provision of an interpreter to a student in any school (including a parochial school) at issue here is much more akin to the aid upheld in *Witters* — state vocational aid which a blind student applied to pursue religious studies at a Christian college. Indeed, the aid at issue in this case is even more circumscribed than the aid in *Witters*, being a single type of in-kind aid rather than a general grant-in aid. The aid at issue here, then, is even better analogized to the loan of a state owned wheel chair or hearing aid to disabled children for use at school, including parochial schools, aid which it would be fanciful to construe as creating a "symbolic union" between church and state.

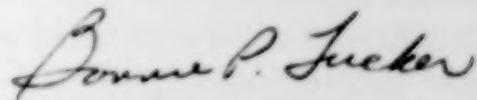
Finally, the perspective provided by Part II of this brief reveals an additional secular effect that the court below did not consider. As discussed above, many deaf children choose to attend parochial school for reasons unrelated to religious preference, for the purely secular purpose of attending an affordable school with classes small enough and structured enough to accommodate their special needs. When the totality of circumstances is considered — the circumscribed nature of the aid made available to deaf children regardless of the type of school they attend; aid that is given directly to the children, not

to the parochial schools; aid which in many cases will facilitate a purely secular rehabilitative purpose of deaf children in choosing to attend parochial schools — it is evident that the primary effect of the aid at issue in this case is a secular one, with any benefit to religion being at most "indirect, remote, or incidental." See *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

Conclusion

For the foregoing reasons, *amicus curiae*, The Alexander Graham Bell Association for the Deaf, urges this Court to reverse the decision below and thereby enable deaf children to receive the services necessary to achieve the appropriate education to which they are legally and morally entitled.

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October Term, 1992

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wife; JAMES ZOBREST, a minor, by LARRY
and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

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TRIAL COURT DOCKET SHEET

TERMED APPEAL

U.S. District Court
U.S. District Court for the District of
Arizona (Tucson)

CIVIL DOCKET FOR CASE #: 88-CV-516

Filed: 8/1/88

Zobrest, et al v. Catalina Foothills

Assigned to: Judge Richard M Bilby

Demand: \$0,000

Nature of Suit: 890

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 20:1401 Education: Handicapped Child Act

LARRY ZOBREST,

Husband

plaintiff

Thomas J Berning, Esq

[COR LD NTC]

Arizona Center for Law
in the

Public Interest

3208 E. Ft. Lowell

Ste 106

Tucson, AZ 85716

327-9547

William Bentley Ball, Esq

[COR LD NTC]

Ball, Skelly, Murren &
Cornell

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Harrisburg, Pa 17108

(717) 232-8731

SANDRA ZOBREST,
Wife
plaintiff

Thomas J Berning, Esq
(See above)
[COR LD NTC]

William Bentley Ball, Esq
(See above)
[COR LD NTC]

JAMES ZOBREST,
a minor, by
Larry and Sandra
Zobrest, his parents
plaintiff

Thomas J Berning, Esq
(See above)
[COR LD NTC]

William Bentley Ball, Esq
(See above)
[COR LD NTC]

v.

CATALINA FOOTHILLS
SCHOOL DISTRICT
defendant

John C Richardson, Esq
[COR LD NTC]
DeConcini, McDonald,
Brammer, Yetwin &
Lacy, P.C.
2525 E Broadway Blvd
Ste 200
Tucson, AZ 85716-5303
322-5000

- 8/1/88 1 Complaint filed summons issued (nl)
[Entry date 8/3/88]
- 8/1/88 2 Motion by plaintiff for preliminary
injunction (nl) [Entry date 8/3/88]
- 8/3/88 3 Notice of Hearing on plas' motion for
preliminary injunction [2-1] at 1:00pm on
8/12/88. (cc: Berning RMB) (yl)
- 8/3/88 4 Notice of Hearing on plas' motion for
preliminary injunction [2-1] set for
1:00pm on 8/12/88. (yl)

- 8/3/88 5 Notice by plaintiffs of taking depo of
Catalina Foothills School District on the
following date(s): 8/9/88 (yl)
- 8/5/88 6 AMENDED VERIFIED COMPLAINT. (yl)
[Entry date 8/9/88]
- 8/5/88 6 Motion by plaintiffs for preliminary
injunction (within amended verified
complaint. (yl) [Entry date 8/9/88]
- 8/8/88 7 Return of service of summons and
complaint on Catalina Foothills School
District by service on Terry Downey,
principal, on 8/4/88. (nl) [Entry date
8/10/88]
- 8/11/88 8 Motion by defendant Catalina Foothills
to exceed page limitation to opposition
to pla motion for preliminary injunction
(nl) [Entry date 8/12/88]
- 8/11/88 9 ORDER by Judge Richard M. Bilby that
defendant Catalina Foothills School
District be allowed to exceed page
limitation in opposition to plaintiffs'
motion for preliminary injunction. (cc:
RMB, Richardson, Berning) (nl) [Entry
date 8/12/88]
- 8/11/88 10 Response by defendant Catalina Foothills
to motion for preliminary injunction
(within amended verified complaint.
[6-1], motion for preliminary injunction
[2-1] (nl) [Entry date 8/12/88]
- 8/12/88 11 M/E: IT IS ORDERED that motion for
preliminary injunction is denied; formal
order will follow. (cc: Berning,
Richardson, RMB) (nl) [Entry date
8/15/88]

- 8/15/88 12 ORDER by Judge Richard M. Bilby that plaintiffs' motion for preliminary injunction is denied. (cc: all counsel of record, RMB) (nl)
- 8/23/88 13 ANSWER by defendant (kc) [Entry date 8/29/88]
- 8/26/88 14 M/E: (RMB) ORD informal status hearing set for 9:30 9/27/88 Fur Directives to cnsl (cc: Richardson, Berning, RMB) (gg) [Entry date 8/31/88]
- 9/30/88 15 M/E: (RMB) ORD stlmt stat rpt due 10/10/88 and 2/10/89, discovery cutoff due 3/27/89, L/R 42c compliance deadline due 5:00 cnsl file w/ct wit lsts by 2/13/89 (cc: Berning, Richardson, RMB) (gg) [Entry date 10/3/88] [Edit date 4/17/89]
- 11/1/88 17 Notice of service by defendant of req for adms, req to prod and non-uniform interogs. (gg) [Entry date 11/4/88]
- 11/2/88 16 Notice of service by plaintiffs of req of admissions and non/uni interogs upon dft. (caf) [Entry date 11/3/88]
- 12/5/88 18 Notice of service by defendant of ans to plas' non-uni interogs and req for admissions (caf) [Entry date 12/6/88]
- 12/9/88 19 Application for Limited Admissions and ORDER: by Judge Richard M. Bilby that WILLIAM B. BALL may appear and participate in this action as counsel for: plaintiffs (cc: Berning Richardson Ball RMB) (caf) [Entry date 12/13/88]

- 12/22/88 20 Notice of service by plaintiff of ans to req for adm and req for prod of docu (caf)
- 1/3/89 21 Notice of service by plaintiffs of svc of ans to first set of non-uniform interogs. (gg)
- 2/6/89 22 Notice of service by defendant of 2nd req for adm and non uni interrog (caf) [Entry date 2/8/89]
- 2/13/89 23 Witness list by Dft Catalina Foothills (caf) [Entry date 2/14/89]
- 2/14/89 24 Proposed Witness list by Plas (caf) [Entry date 2/15/89]
- 3/27/89 25 Stipulation to extnd disc ddl (caf) [Entry date 3/28/89]
- 3/27/89 - LODGED: Order re stipulation [25-1] (caf) [Entry date 3/28/89]
- 4/7/89 26 Motion by plaintiffs for summary judgment (caf) [Entry date 4/10/89]
- 4/7/89 27 Notice of Hearing setting motion for Pla's summary judgment [26-1 at 2:30 on 7/14/89 (caf) [Entry date 4/10/89]
- 4/7/89 28 Stipulation (Statement) of facts by plaintiff in support of motion for summary judgment [26-1] (caf) [Entry date 4/10/89]
- 4/7/89 29 Motion by plaintiff to exceed page limitation re: memo p/a re: mtns for sum jgm (caf) [Entry date 4/10/89]
- 4/7/89 - LODGED: Order re motion to exceed page limitation re: memo p/a re: mtns

- for sum jgm [29-1] (caf) [Entry date 4/10/89]
- 4/7/89 - LODGED: memo of p/a in supt of pla's mtn for sum jgm (caf) [Entry date 4/10/89]
- 4/10/89 30 M/E: ORD tht Local Rule 42 compliance date previously set for 5/30/89 is VACATED and will be reset by the ct after ruling on the mtn for sum jgm (cc: Berning Richardson Ball RMB) (caf)
- 4/10/89 31 Stipulation to admit exhibits a,b,c and d as evidence (caf)
- 4/10/89 32 ORDER by Judge Richard M. Bilby granting motion to exceed page limitation re: memo p/a re: mtns for sum jgm up to 18 pgs (caf) [Entry date 4/12/89]
- 4/10/89 33 Memorandum of p/a by plaintiffs in support of motion for summary judgment [26-1] (caf) [Entry date 4/12/89]
- 4/11/89 - LODGED: Order re stipulation [31-1] (caf) [Entry date 4/12/89]
- 4/13/89 34 ORDER by Judge Richard M. Bilby granting stipulation that Salpointe Docs, cps attached to stip, may be adm into evidence and filed w/ct as part of recd. (gg) [Entry date 4/17/89]
- 4/27/89 35 Motion by defendant for summary judgment (caf) [Entry date 4/28/89]
- 4/27/89 36 Rule 11 Statement of facts by defendant in support of motion for summary

- judgment [35-1] (caf) [Entry date 4/28/89]
- 4/27/89 37 Notice of Hearing setting motion for summary judgment [35-1] at 2:30 on 7/17/89 (caf) [Entry date 4/28/89]
- 5/10/89 38 Opp (Response) by defendant to Pla's motion for summary judgment [26-1] (caf) [Entry date 5/12/89]
- 6/5/89 39 Memo of p/a (A) in oppo (Response) by plaintiff to dft's motion for summary judgment [35-1] (B) in Reply to dft's oppo to plas' motion for summary judgment [26-1] (kc) [Entry date 6/6/89]
- 6/6/89 40 Stipulation concerning subst of alternate afdt (kc) [Entry date 6/7/89]
- 6/6/89 41 Plas' Affidavit of Sandra Zobrest (kc) [Entry date 6/7/89]
- 6/20/89 42 Reply memo by defendant in suppt of its motion for summary judgment [35-1] (kc)
- 7/17/89 43 M/E: HRG: Mtms for sum jgm. ORD taking under advisement the mtms for sum jgm on 7/17/89 (caf) [Entry date 7/20/89]
- 7/19/89 44 ORDER by Judge Richard M. Bilby granting Dft's x- motion for summary judgment [35-1] and denying Pla's motion for summary judgment [26-1] and this action is DISMISSED (caf) [Entry date 7/20/89]
- 7/20/89 45 JUDGMENT: ORD and ADJ tht jgm is entered in favor of the Dft and agnst the Pla (caf)

- 8/7/89 46 Notice of appeal by plaintiffs Larry Zobrest, Sandra Zobrest & James Zobrest from Dist. Court decision judgment (45-1), order (44-1) cc: 9CCA/All Counsel (as) [Entry date 8/8/89]
- 8/7/89 - Received \$105.00 appeal fee appeal [46-1] (as) [Entry date 8/8/89]
- 8/11/89 - Docket Fee Notification form sent to 9CCA appeal [46-1] (as)
- 8/11/89 - Certificate of Record Transmitted to 9CCA cc: All Counsel (as)
- 8/23/89 - Notification by 9CCA of Appellate Docket Number appeal [46-1] 89-16035 (as) [Entry date 8/24/89]
- 8/24/89 47 Transcript Designation and Ordering Form, filed 8/24/89. (as)
- 8/25/89 48 Court Reporter's Transcript of Proceedings for the following date(s): 7/17/89 (Re: Cross-Motions for Summary Judgment) (as) [Entry date 8/28/89]
- 8/28/89 - Amended Certificate of Record Transmitted to 9CCA cc: All Counsel (as)
- 9/1/89 49 CA ORDER re Certificate of Record/ Transcript Designation Ordering Form (as) [Entry date 9/6/89]

[SEAL]

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert E. Corbin

June 27, 1988

The Honorable Stephen D. Neely
 Pima County Attorney
 Civil Division
 32 N. Stone, Suite 1500
 Tucson, Arizona 85701-1412

Re: I88-072 (R88-059)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B) we have reviewed your April 26, 1988 opinion to the Assistant Superintendent of Catalina Foothills School District and concur with your conclusion that a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates the First Amendment of the Federal constitution and art. II, § 12 of the Arizona Constitution.

Sincerely,

/s/ Bob Corbin
 BOB CORBIN
 Attorney General

BC:LSP:pnw

[Seal]

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

JAMES M. HOWARD
CHIEF DEPUTY

OFFICE OF THE
Pima County Attorney
Civil Division

32 N. STONE
SUITE 1500

Tucson, Arizona 85701-1412
(602) 622-6621

OPINION NO. 88-04

TO: Terry Downey, Assistant Superintendent
Catalina Foothills School District

FROM: JoAnn Sheperd
Deputy County Attorney

DATE: April 26, 1988

RE: Request for Legal Opinion

QUESTION PRESENTED

You have requested a legal opinion as to whether the school district may provide the services of an interpreter for a deaf student if that student chooses to attend a parochial high school. You have also informed me that this high school is not the only suitable placement for this student, but is the one chosen by the student and his parents as offering the most desirable educational environment. In addition, the parents have agreed to pay for

an interpreter's services during religious instruction classes.

ANSWER

See body of opinion.

DISCUSSION

I. The Education of the Handicapped Act.

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. §1400 *et seq.*, provides federal money to state and local agencies to assist in the education of handicapped children. This funding is conditioned upon each state's compliance with comprehensive goals and procedures.

In a 1982 opinion, the U.S. Supreme Court described the Act as:

(A)n ambitious federal effort to promote the education of handicapped children, . . . passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out'.'

Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 179, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), quoting H.R. Rep. No. 94-332, p. 2 (1975) (H.R. Rep.).

Congress, by its statutory declaration of policy as set forth in 20 U.S.C. §241(a), recognized that not all handicapped children from educationally deprived areas

attend public school and therefore it was "necessary to include eligible children attending private school among the beneficiaries of the Act." *Wheeler v. Barrera*, 417 U.S. 402, 405-406, 41 L.Ed.2d 159, 94 S.Ct. 2274 (1974). The Act therefore focuses on the identification and evaluation of all handicapped children and requires that participating state and local educational agencies provide necessary services, including a free and appropriate public education "tailored to the unique needs of the handicapped child," *Rowley*, 458 U.S. at 176.

Federal regulations promulgated in accordance with the Act address the issue of parental placement of handicapped children in private schools. 34 C.F.R. §300.403 provides in pertinent part:

- (a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§330.450-330.460.

34 C.F.R. §300.452 addresses the responsibilities of a "local educational agency", providing that:

- (a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

"Local educational agency" is defined in 20 U.S.C. §244(6)(B) as including:

(A) public board of education . . . legally constituted within a State for either administrative control or direction of . . . public elementary or secondary schools in a . . . county . . . school district, or other political subdivision of a State . . .

"Related services" is defined in 34 C.F.R. §300.13 as:

- (a) (T)ransportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education . . .

The Act and its accompanying regulations do not expressly require that services be provided on the premises of a private school or, for that matter, on the premises of a public school; nor do they require a public agency to concede to parental wishes regarding specific programs and placement. The regulations do provide administrative procedures whereby parents are able to challenge services, programs and financial responsibility. See 34 C.F.R. §300.403(b).

II. Constitutional Interpretation of the Act

The U.S. Supreme Court has analyzed whether the provision of certain services by a public school district, pursuant to the Act, to a handicapped student attending a private parochial school constitutes a violation of the Establishment Clause of the First Amendment of the U.S. Constitution, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

In constructing its analysis, the Court has examined the constitutionality of various remedial and enrichment programs implemented to provide assistance to elementary and secondary education students enrolled in nonpublic schools, applying the test first set down in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 92 S.Ct. 2105 (1971). The *Lemon* test provides that in order for a statute to be upheld in the face of an Establishment Clause challenge, it must (1) have a secular purpose; (2) have a principal or primary effect that neither advances or inhibits religion; and (3) not foster an excessive entanglement of government with religion. *Id.* at 612, 613.

The Court recently applied this test in companion cases decided in 1985, both of which involved the constitutionality of publicly-financed educational programs provided to nonpublic school students. In the first case, *Grand Rapids School District v. Ball*, 473 U.S. 373, 87 L.Ed.2d 267, 105 S.Ct. 3216 (1985), the Court invalidated the provision of certain publicly-sponsored remedial and supplementary programs which were conducted on sites leased from and located on private school property, finding that the programs had the primary or principal effect of advancing religion. In the facts of that case, students moved between religious school instruction and remedial or supplementary classes, the latter two being taught by public school employees on the premises of the parochial school. The Court held that this program resulted in a "symbolic union of government and religion in one sectarian enterprise", constituting an impermissible effect under the Establishment Clause. *Id.* at 392.

In the companion case, *Aguilar v. Felton*, 473 U.S. 402, 87 L.Ed.2d 290, 105 S.Ct. 3232 (1984), the Court invalidated a program in which a city used federal monies to pay the salaries of public employees providing instruction to educationally deprived children in nonpublic schools, on the basis of excessive entanglement of government with religion.

In *Meek v. Pittenger*, 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975), the Supreme Court considered the constitutionality of a law which authorized the State of Pennsylvania to loan public school textbooks to children attending nonpublic schools. The statute also authorized loans by the state of instructional materials and equipment, plus the provision of certain "auxiliary services", directly to the nonpublic schools. These "auxiliary services" included counseling, testing, psychological services, speech and hearing therapy and certain other related remedial services.

The Court invalidated the state's provision of instructional materials and equipment to nonpublic schools, even though the items were nonsectarian in nature, holding that when state aid:

(F)lows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . (it) has the impermissible primary effect of advancing religion,

at 366.

It also prohibited the provision of the auxiliary services, which utilized public employees, as these employees,

(A)re performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. (Emphasis added).

Id. at 371.

Arizona courts have not yet been confronted with the particular issue you have presented. However, Article 2, §12 of the Arizona Constitution provides:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

The Arizona Attorney General concluded in Op.Atty.Gen. No. 180-62 that the rendering of special education services which are characterized as "therapeutic", or which involve teaching or counseling on parochial school premises, results in a violation of the Establishment Clause. The opinion cites *Wolman v. Walter*, 433 U.S. 229, 53 L.Ed.2d 714, 97 S.Ct. 2593 (1977), in which the Court examined various provisions of a state statute which allowed the expenditure of public funds for aid to nonpublic school students. The Court specifically addressed the issue of whether various services could be provided on the premises of parochial schools and concluded that while the provision of diagnostic services on-site is permissible, therapeutic service delivery on parochial school premises violates the Establishment Clause. Of particular significance is the distinction made by the Court between diagnostic and therapeutic services:

First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

Id. at 244.

Analogizing this holding to the issues your question has raised, it appears appropriate to characterize an interpreter as more akin to a therapist or a teacher than a diagnostician. The very nature of an interpreter's role requires that he or she "step into the shoes" of the teacher in order to convey all information disseminated in class to the hearing-impaired student. The interpreter therefore becomes "closely associated with the educational mission of the nonpublic school," as set forth in *Wolman, supra*.

Conclusion

Although federal and state law clearly require the provision of special education and certain related services to handicapped students attending nonpublic schools, it is equally clear that the provision of certain of these services pursuant to this mandate violates portions of

both the United States and Arizona Constitutions. In light of the U.S. Supreme Court's holdings in *Wolman* and *Meek, supra*, excessive entanglement of state and church may well result if a publicly-funded interpreter provides a conduit for the transmission of sectarian views to a student attending a nonpublic parochial school, "in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek*, 421 U.S. at 371.

A copy of this opinion has been submitted to the Attorney General for his review, pursuant to A.R.S. §15-253(B).

Respectfully submitted,
STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

By: /s/ JoAnn Sheperd
JoAnn Sheperd
Deputy County Attorney

APPROVED:

/s/ David G. Dingeldine
David G. Dingeldine
Chief Civil Deputy County Attorney

CC: Robert Corbin, Esq.
Arizona Attorney General
Anita Lohr
County School Superintendent

Tom Berning - #005370
Arizona Center for Law
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(602) 327-9547

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No. CIV 88-516
SANDRA ZOBREST,	)	TUC(RMB)
husband and wife; JAMES	)	AMENDED VERIFIED
ZOBREST, a minor, by	)	COMPLAINT
LARRY and SANDRA	)	(Preliminary
ZOBREST, his parents,	)	Injunction
	)	Requested)
Plaintiffs,)	
v.	)	(Filed Aug. 5, 1988)
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
_____)	

Plaintiffs, by counsel state for their amended cause of action as follows:

I. JURISDICTION AND PARTIES.

1. In this action the plaintiffs seek preliminary and permanent injunctions requiring the defendant, Catalina Foothills School District to furnish interpreter services to a deaf child enrolled in a nonpublic religious school

pursuant to the Education for Handicapped Children Act, 20 U.S.C. § 1401 et. seq. (hereinafter EHA).

2. This Court has jurisdiction to decide this action and to grant the requested relief pursuant to 20 U.S.C. § 1415(4)(A) and 28 U.S.C. §§ 2201 and 2202, and Rule 65 of the Federal Rules of Civil Procedure.

3. Plaintiffs are Larry Zobrest and Sandra Zobrest, husband and wife, and their minor son, James Zobrest, who brings this action by and through his parents and general. All plaintiffs reside in Tucson, Arizona within the boundaries of defendant Catalina Foothills School District.

4. Defendant is the Catalina Foothills School District. Defendant school district is a political subdivision of the State of Arizona and is properly named a defendant pursuant to A.R.S. § 15-326(1).

5. The plaintiff James Zobrest is a child 14 years old, who has been profoundly deaf since birth. He is enrolled in Salpointe Catholic High School, Tucson, and will enter the ninth grade thereof at the opening of the coming term, August 17, 1988.

II. FACTUAL ALLEGATIONS.

6. The plaintiff James Zobrest and his parents, plaintiffs Larry Zobrest and Sandra Zobrest, are individuals of the Roman Catholic faith.

7. The plaintiff James Zobrest will fulfill the requirements of the Arizona compulsory school attendance statute, A.R.S. § 15-802, through attendance at Salpointe Catholic High School.

8. The plaintiff parents of James Zobrest will pay full tuition for his education at Salpointe Catholic High School, but they are unable to afford to hire a certified sign language interpreter for him in order that he may participate in classes at the school.

9. Plaintiff James Zobrest is a "handicapped person" within the meaning of the EHA, 20 U.S.C. 1401(a). He resides within the boundaries of defendant school district and is entitled to receive services from it.

10. Defendant Catalina Foothills School District is a "local educational agency" under the terms of the EHA.

11. As a "local educational agency" defendant Catalina Foothills School District is required by the EHA and the regulations issued thereunder to "provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."

12. "Related services," within the meaning of the EHA, includes development, corrective and other supportive services.

13. The services of interpreters for deaf persons are supportive services, and are indispensable to this deaf child's ability to function in a classroom. Such services are neither diagnostic nor therapeutic.

14. A certified interpreter for the deaf is a neutral conduit, akin to a hearing aid, for the transmission of orally delivered language into sign language and from sign language into orally delivered language. A certified interpreter for the deaf is forbidden by the Register of Interpreters For the Deaf, Inc. Code of Ethics of his or her

profession from engaging in teaching or the explaining of information during the course of performing interpreting for a deaf person.

15. The plaintiffs, in October 1987, formally requested the defendant school district to furnish the services of a certified interpreter to the plaintiff James Zobrest.

16. The defendant school district referred plaintiffs request to the Pima County Attorney and the County Attorney issued an opinion on April 26, 1988 that the furnishing by the school district of such services to a deaf child enrolled in a parochial school would be violative of the Arizona and United States Constitutions.

17. On May 12, 1988, the opinion was referred to the Attorney General of Arizona with respect to whether the plaintiff James Zobrest could be denied the services of an interpreter by the school district solely on the ground of his enrollment in a religious school of conscientious choice.

18. On June 27, 1988, the Attorney General affirmed, without opinion, the conclusion of the defendant school district's attorney. This information was forwarded to plaintiffs on July 12, 1988.

19. Because of defendants' denial of the requested service plaintiffs have been forced to retain the services of legal counsel.

20. Unless the relief here sought is granted, the plaintiff parents and child may be forced to forsake the

religious education for their child which their conscientious beliefs require, which religious education is available to their son at Salpointe Catholic High School, a school wherein he can fulfill the compulsory attendance requirements of law. Without issuance of a preliminary injunction plaintiff James Zobrest may not be in a position to attend school at Salpointe Catholic in the fall and may not be able to benefit from special education.

21. The plaintiffs have no adequate remedy at law and will suffer immediate irreparable injury unless a preliminary and permanent injunction is granted.

22. Plaintiffs cannot avail themselves of the administrative "due process" procedures provided by 20 U.S.C. § 1415 because there is insufficient time for them to do so prior to the start of the school year and to attempt to do so would be futile. Additionally, defendants failed to provide plaintiffs with the required written notice that would have timely informed them of their rights to "due process" under the EHA.

III. CAUSES OF ACTION.

23. Plaintiffs reallege and incorporate by reference all allegations previously set forth in this complaint.

24. Defendants' denial of the requested interpreter services to the plaintiff James Zobrest violates the EHA by depriving the said James Zobrest of related services of which, by the terms of the EHA, he is an intended beneficiary.

25. Defendants failed to provide appropriate written notice to the plaintiffs of their due process rights

under the EHA and as a result the plaintiff child James Zobrest may not receive an appropriate education this fall.

26. Defendants' denial of the requested interpreter services to the plaintiff child James Zobrest is violative of their rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

27. Defendants' denial of the requested interpreter services to the plaintiff child James Zobrest imposes upon him and his parent plaintiffs an unconstitutional condition, *i.e.*, that they may enjoy participation in a public benefit only on the condition that they forego exercise of their First Amendment right to the free exercise of their religion.

WHEREFORE, plaintiffs request that this Court grant them judgment as follows:

1. That pursuant to Rule 65 of the Federal Rules of Civil Procedure a preliminary injunction, mandatory in character, pending trial of the issues, be granted to the plaintiffs against the defendant, requiring the defendant to furnish the services of a qualified interpreter to the plaintiff James Zobrest at the Salpointe Catholic High School commencing August 17, 1988.

2. That the plaintiffs be granted a permanent injunction requiring defendants to furnish the services of a qualified interpreter to the plaintiff James Zobrest at Salpointe Catholic High School.

3. That should plaintiff James Zobrest miss any education as a result of defendant's violation of his rights under the EHA, he be granted compensatory education.

4. That plaintiffs' attorneys be awarded reasonable costs and fees pursuant to 20 U.S.C. § 1415.

5. For such other and further relief as the Court deems just and proper.

VERIFICATION

[illegible]

SANDRA ZOBREST, being first duly sworn, upon her oath, deposes and says:

She is a named plaintiff and mother to James Zobrest, the minor named plaintiff in the above-entitled action and as such is entitled to verify the foregoing Amended Complaint; she has read the foregoing Amended Complaint and is familiar with the contents thereof, and the foregoing Amended Complaint is true to the best of her knowledge, except as to those matters stated upon information and belief, and as to those, she believes them to be true.

Further affiant sayeth not.

/s/ Sandra Zobrest
SANDRA ZOBREST

SUBSCRIBED AND SWORN to before me this 5th
day of August, 1988 by SANDRA ZOBREST.

/s/ Lisa K. Maier
Notary Public

My Commission Expires:

9-21-90

DATED this 8th day of August, 1988.

/s/ Tom Berning
Tom Berning
Arizona Center for Law
in the Public Interest
3208 East Fort Lowell
Suite 106
Tucson, Arizona 85716
Attorneys for Plaintiffs

Copies of the foregoing mailed
this 8th day of August, 1988 to:

Catalina Foothills School District
2101 East River Road
Tucson, Arizona 85718

/s/ _____

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(602) 327-9547

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No.
SANDRA ZOBREST,)	
husband and wife; JAMES	)	MOTION FOR
ZOBREST, a minor, by	)	PRELIMINARY
LARRY and SANDRA	)	INJUNCTION
ZOBREST, his parents and)	
guardians <i>ad litem</i> ,)	
Plaintiffs,)	
v.)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
Defendants.)	
_____)	

Plaintiffs move and request that this Court, grant them a preliminary injunction requiring defendant school district to provide the services of a qualified sign language interpreter to plaintiff James Zobrest at Salpointe Catholic High School during the 1988-89 school year.

This motion is made pursuant to Rule 65 of the Federal Rules of Civil Procedure and the Education for

Handicapped Children Act, 20 U.S.C. § 1401 et. seq. and is supported by reference to the Verified Complaint, the attached Memorandum of Points and Authorities and the testimony to be presented at hearing on the matter.

DATED this 8th day of August, 1988.

/s/ Tom Berning
 Tom Berning
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UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor,)	No.
by LARRY and SANDRA)	
ZOBREST, his parents,)	
Plaintiffs,)	OPPOSITION TO
vs.)	PLAINTIFFS'
CATALINA FOOTHILLS)	MOTION FOR
SCHOOL DISTRICT,)	PRELIMINARY
Defendant.)	INJUNCTION
_____)	

For the reasons set forth in the attached Memorandum of Points and Authorities, the Defendant, Catalina Foothills School District, requests the Court to deny Plaintiffs' Application for Preliminary Injunction.

DATED this 11th day of August, 1988.

DeCONCINI McDONALD
BRAMMER YETWIN & LACY

By /s/ John C. Richardson
John C. Richardson
Gary F. Urman
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Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

The primary question presented by the present action is whether the provision of a sign language interpreter in a parochial school by a public school district is violative of the establishment clause of the First Amendment.

Plaintiffs assert that, pursuant to the Education for Handicapped Children Act, 20 U.S.C. § 1401 *et seq.* ("EHA"), Catalina Foothills School District (the "District") must furnish a sign language interpreter for James Zobrest, their son, who plans to enroll this fall at Salpointe Catholic High School ("Salpointe"), a Catholic High School. Although James has attended District schools for the last three years, his parents now claim it is a tenet of their faith to have their child educated in a parochial school, and that the District's legal inability to provide a sign language interpreter somehow will violate their rights to free exercise of religion.

James Zobrest, who will be entering the ninth grade this fall, is profoundly deaf. James' individualized education program ("IEP") presently does not provide for

James' attendance in a parochial classroom with the services of a sign language interpreter. For as long as James has attended District schools in the regular classroom, the District has provided for James the services of a sign language interpreter. In October or November of 1987, Plaintiffs orally notified the District that James intended to attend Salpointe the following fall. At that time or sometime thereafter, Plaintiffs requested the District to provide a sign language interpreter for James at Salpointe because such aid would be indispensable to his ability to function in a classroom. Contrary to the allegations contained in Plaintiff's Complaint, the District informed the Zobrests that, although it would be happy to provide an interpreter for James in a public school, it would be necessary to determine whether provisions of an interpreter at Salpointe was legally permissible. Testimony to be presented at the hearing in this matter will establish that at no time did the District unconditionally agree to provide a sign language interpreter for James at a parochial school.

The District referred the matter to the Pima County Attorney's Office which issued an opinion on April 26, 1988, stating that the District's provision of interpreter services on the premises of a parochial school would violate both the United States Constitution and the Arizona State Constitution. This opinion was later affirmed by the Arizona Attorney General. Attorney General Opinion 188-072 (June 27, 1988). The opinion of the Arizona

Attorney General was forwarded to the Zobrests on July 11, 1988.¹

Salpointe is a Roman Catholic high school. The 1987-1988 Parent-Student Handbook includes in its expression of "Philosophy and Objectives of Salpointe Catholic High School" a statement that

Salpointe Catholic High School is a community of parents, faculty, staff and students dedicated to living and perpetuating the mission of Jesus Christ, serving the young people of the Tucson Metropolitan area who desire a Catholic education. Salpointe Catholic High School 1987-1988 Parent Student Handbook, at p. 6, attached hereto as Exhibit A.

Lay teachers are hired at Salpointe because, in addition to their qualifications to teach at a college preparatory high school, they profess their faith. Prayers are said regularly at the school.

James is scheduled for six classes this fall. The teachers of three of these classes will be nuns. Under these circumstances, and for the reasons set forth below, an order by this Court of a preliminary injunction

¹ Plaintiffs suggest that they were kept in the dark with respect to a response to their request that the District provide an interpreter for James, and that they somehow were prejudiced by not receiving a "formal" response until July 11, 1988. On the contrary, testimony at the preliminary injunction hearing will demonstrate that Plaintiffs continually were informed regarding the status of their request, were aware of the April 26, 1988, opinion of the Pima County Attorney's Office, and received copies of all correspondence related to their request.

requiring the District to provide interpreter services in a parochial school is inappropriate.

The District acknowledges that a court must consider the total effect of four criteria when determining whether a preliminary injunction is proper:

- (1) The significance of the threat of irreparable harm to the plaintiff if the injunction is not granted;
- (2) The state of the balance between this harm and the injury that granting the injunction would inflict upon the Defendant;
- (3) The probability that Plaintiff will succeed on the merits; and
- (4) The public interest involved.

Wright & Miller, *Federal Practice and Procedure*, § 2948, pp. 430-31 (1973). With respect to each of these criteria, Plaintiffs bear the burden of establishing that the balance of the equities tips in their favor. *Riely v. United Bank of Arizona*, 397 F.Supp. 557 (D.Ariz. 1975), affirmed, 562 F.2d 56 (9th Cir. 1977); *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 626 P.2d 1115 (App. 1981). As will be established in the following Memorandum, Plaintiff has failed to demonstrate, and is legally unable to demonstrate, that the facts of this case warrant an order of preliminary injunction.

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY MAY SUCCEED ON THE MERITS OR THAT THEY CAN OVERCOME ESTABLISHMENT CLAUSE PROHIBITIONS.

The District questions whether the proper scope of inquiry for the purposes of a preliminary injunction, as

set forth by Plaintiffs, is whether Plaintiffs possess a "fair chance of success," particularly when, as here, Plaintiffs' showing of irreparable harm is insufficient to justify a preliminary injunction in any event. See Argument II, below.² Rather, the circumstances of this case suggest that, in order to obtain injunctive relief, Plaintiffs must demonstrate at least a strong likelihood of success on the merits. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980). In any event, the existent facts and legal principles reveal that Plaintiffs' chance of success on the merits is minimal, if at all.

The District admits that the EHA requires it to provide for James, as part of a free appropriate public education, the services of a sign language interpreter, so long as James is educated in a non-parochial setting. However, the establishment clause of the First Amendment, which prohibits the public support or promotion of religion, prohibits the publicly funded provision of interpreter services in a Catholic high school. Accordingly, because the District legally is not permitted to provide the relief requested by Plaintiffs, preliminary injunctive relief should be denied.

The landmark decision in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), provides three

² The District believes the required showing of probable success on the merits rests on a sliding scale: as the showing of irreparable harm decreases, the requisite showing of probability of success on the merits increases. *Justice v. National College Athletic Association*, 577 F.Supp. 356 (D.Ariz. 1983).

tests for analyzing the constitutionality of any governmental action with respect to the establishment clause. Government action is improper if it fails any one of the following three tests: (1) the action must have a secular purpose; (2) the action must not have the primary effect of advancing religion; and (3) the action must not create excessive entanglement between church and state. 403 U.S. at 612-613; 915 S.Ct. at 2111, 29 L.Ed.2d at 755. A review of judicial decisions applying these standards indicates that the provision of an interpreter by the District in a parochial classroom fails to meet the one or more of the three prongs of the *Lemon* analysis, and therefore would be violative of the establishment clause.

A. The Application of the EHA in This Case Has The Impermissible Effect of Promoting Religion.

Plaintiffs allege that District funded interpreter services for a parochial school student is permissible simply because the EHA, which mandates the provision of interpreter services in non-parochial schools, serves a secular purpose and has a secular effect. Plaintiffs apparently fail to consider however, that the application of the EHA in the manner Plaintiffs request, and under the circumstances of the present case, has the impermissible effect of advancing religion.

In *Bowen v. Kendrick*, ___ U.S. ___, 108 S.Ct. 2562, 65 U.S.L.W. 4818 (1988), the Supreme Court explicitly recognized that a constitutional challenge based on the establishment clause could be one which was limited to the validity of the statute as it applied to a particular circumstance, without challenging the statute as a whole:

There is, then, precedent in this area of constitutional law for distinguishing between the validity of a statute on its face and its validity in particular applications.

65 U.S.L.W. at 4821. See also *Hunt v. McNair*, 413 U.S. 743, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973). Accordingly, the District need not challenge the constitutionality of the EHA as a whole.

Although EHA as a whole does have the admittedly secular purpose of assuring that all handicapped children will have available to them a free appropriate public education with the related services necessary to accommodate their unique needs, as applied in this case, a publicly funded interpreter in classes at Salpointe has the unconstitutional effect of promoting the religious mission of the school. The only purpose Plaintiffs assert for James' enrollment at Salpointe is to further James' religious education and development. The provision of a District paid sign language interpreter at Salpointe, particularly when James has available to him several public high schools that are able to provide handicap-related services equal or superior to those offered at Salpointe, will have the specific effect of promoting James' religious development – at government expense. As such the application of the EHA to these facts has the impermissible effect of providing government assistance for the specific purpose of advancing James' religious development.

The District emphasizes that, in general, the provision of a sign language interpreter to assist the education of a deaf student is a laudable and necessary government activity. However, the Supreme Court has stated in

Hunter v. McNair, 413 U.S. 743, 93 S.Ct. 2868, 37 L.Ed.2d 923, 931 (1973), that,

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission. . . .

James has at his disposal the services of an interpreter at any neighboring *non-parochial* high school he chooses to attend. It is apparent from Plaintiffs' pleadings in this matter that James would attend one of these high schools, but for his desire to develop religiously in a parochial setting. While the District applauds James' desire to develop spiritually, it is not permitted to affirmatively assist him with his spiritual development.

B. The Provision of a District Funded Interpreter at Salpointe Creates Excessive Entanglements Between Church and State.

It is well recognized that, for the purposes of an establishment clause inquiry, a parochial school is a "pervasively sectarian" institution. *Bowen v. Kendrick*, 56 U.S.L.W. at 4827. Hence, the provision by the District of a sign language interpreter for James in his classes at Salpointe will inject impermissibly a government presence in this sectarian setting.

Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1752, 44 L.Ed.2d 217 (1975), addresses directly the question of providing "speech and hearing services" to parochial schools. The Court there held that the state funded provision of professional staff to provide speech and hearing

services violated the Establishment Clause because they were performed on the premises of the school and the only guard against the sectarianization of that work was the "good faith" and "professionalism" of the professional. The decisions of the Court have made it clear that such reliance is not enough to ensure a strict non-ideological posture would be maintained.³ 421 U.S. at 368-399, 44 L.Ed.2d at 233-234.

The Plaintiffs cite *Witters v. Washington Department of Services for Blind*, 474 U.S. 41, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986), to argue that the EHA does not have the primary effect of advancing religion. *Witters* involved a blind person who was seeking financial assistance under the state vocational rehabilitation program for the blind. The blind person intended to use the financial assistance to enroll in a Christian educational institution with the express purpose of becoming a pastor or missionary. The Court ruled the aid should go to him because the vocational assistance was provided directly to the individual and not to the sectarian school and hence any benefit to the sectarian school was attenuated.

Witters is inapposite because the aid given to *Witters* was merely financial aid and did not bring the government into the classroom. In *Witters*, once the student received his financial assistance payment, the government presence disappeared. In the present case, a public

³ In the present case, because sign language interpreters are required by their code of ethics to sign all communications without comment on editorial adjustments, there is no way to avoid the communication of religious concepts through the government-funded interpreter.

employee is asked to be present daily in a parochial classroom to transmit and communicate all topics of discussion, including religious discussions that occur in class. The issue in the present case is not whether the state is advancing religion by providing tuition which the student uses to enter a religious institution, as was presented in *Witters*. The issue here is whether the government may provide instructional or material aid in the classroom of a parochial high school which is "dedicated to living and perpetuating the mission of Jesus Christ." 1987-88 Salpointe Catholic High School Parent Student Handbook at p. 6, a copy of which is attached hereto as Exhibit C.

Grand Rapids School District v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), and *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), are more on point. In *Grand Rapids*, certain taxpayers challenged two programs adopted by a public school district in which teachers were provided to nonpublic schools to teach supplementary classes. The great majority of those nonpublic schools were sectarian. The programs were struck down by the Court based on the premise that:

At the religious schools here - as at the sectarian schools that have been the subject of our past cases - "the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within that institution, the two are inextricably intertwined." . . . *Grand Rapids*, 473 U.S. at 388, 87 L.Ed.2d at 280.

In *Wolman v. Walter*, certain taxpayers in Ohio challenged, under the Establishment Clause, a statute which authorized public funds for, among other things, supplying

nonpublic school children with instructional materials and equipment. The Court struck down the provisions of the statute which provided instructional materials and equipment in parochial schools, holding that because the very purpose of many sectarian schools is to provide an integrated secular religious education, the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *Wolman v. Walter*, 433 U.S. at 249-250, 53 L.Ed.2d 733. "In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part to support the religious role of the schools." 433 U.S. at 250, 53 L.Ed.2d at 734.

The facts of this case do not indicate that at Salpointe there can be a clear distinction between secular and sectarian educational functions. At Salpointe, James will attend classes taught by three nuns and three by lay teachers, each of whom may have been hired in whole or in part on the basis of his or her unique qualifications to combine education and ministry. Although Plaintiffs agree to pay the cost of an interpreter during religion class, it is reasonable to assume that lectures and discussions in James' other classes will be injected with religious references and topics, all of which would be communicated to James by a publicly-employed individual present in the classroom.

The precedents demonstrate that the Supreme Court has refused to permit government services such as a sign language interpreter to be present in a parochial classroom. Accordingly, Plaintiffs' action should not succeed on the merits and Plaintiffs' petition for preliminary injunction relief should be denied.

II. NO IRREPARABLE HARM IS THREATENED.

Plaintiff's only allegation of irreparable harm is that James will be unable to develop religiously if his parents are unable to afford the cost of providing James interpreter services at Salpointe. It should be emphasized that Plaintiffs do not allege that James will receive an inferior education in a public high school.⁴ Not only is Plaintiffs' allegation of harm unwarranted, but it is insufficient to support a preliminary injunction.

Until this matter is ultimately resolved in a proper trial or other proceedings, James is free to enroll in a public high school, and to obtain therein all of the interpreter services he requires. It is simply not reasonable to assert that James' religious development depends so much on attendance at Salpointe and that James has no other suitable non-governmental sources for spiritual development.⁵

Moreover, James and his parents have a suitable legal remedy under the EHA. Judicial decisions have established the right of Plaintiffs to enroll James at Salpointe

⁴ On the contrary, Defendant suggests that any one of the neighboring public high schools, which are supported by public funds and which have considerable experience in educating and accommodating the needs of handicapped students, is capable of servicing James' handicap in a manner at least equal if not superior to that of Salpointe.

⁵ The District notes that Plaintiffs' emphasis on the importance of attending Salpointe for spiritual development for the purpose of alleging irreparable harm is inconsistent with its later argument that the provision of government services in the parochial high school will not impermissibly entangle church and state.

and provide interpreter services at their own expense. If Plaintiffs ultimately prevail in this action, they may be entitled to reimbursement from the District for the additional cost of an interpreter incurred. *See Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) *cert denied*, 473 U.S. 906, 105 S.Ct. 3529, 87 L.Ed.2d 653 (1985), *cert denied*, 474 U.S. 918, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985); *S-1 By and Through P-1 v. Spangler*, 650 F.Supp. 1427 (M.D.N.C. 1986); *Adams Central School Dist. No. 090, Adams County v. Deist*, 334 N.W.2d 775, 214 Neb. 307 (1983), supplemented 338 N.W.2d 591, 215 Neb. 284, *cert denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983). In the meantime, however, it is inappropriate for Plaintiffs to expect the District to finance James' interpreter services at Salpointe where Plaintiffs possess adequate alternatives and legal remedies to mitigate the ultimate effect of any alleged (albeit insubstantial) harm.

The District is astounded that Plaintiffs allege that James is being denied his First Amendment rights to free exercise of his religious beliefs. The District has placed no prohibitions on James' practice of his religious beliefs. Moreover, the District has not dictated that James should not attend Salpointe High School. On the contrary, the District supports James' decision to attend the school of his choice and provided a letter of recommendation in support of his application for admission to Salpointe. Letter of Terry T. Downey dated December 10, 1987, attached hereto as Exhibit B. The District asserts only that it may not permissibly expend public funds to affirmatively support James' attendance at a parochial high

school.⁶ *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, ___ U.S. ___, 108 S.Ct. 1319, 99 L.Ed.2d 534, 56 U.S.L.W. 4292 (1988) (Free Exercise clause did not require government to prohibit or forego profitable timber harvesting and road construction in area traditionally used for religious purposes by members of three American Indian tribes).

III. A PRELIMINARY INJUNCTION WOULD PLACE UNDUE HARDSHIP UPON THE DISTRICT AND WOULD VIOLATE PUBLIC POLICY.

Plaintiffs' summary conclusion that a preliminary injunction would cause the District no harm is misplaced. The District faces substantial and undue hardship if it is required to comply with a preliminary order to provide interpreter services at Salpointe High School.

The present litigation arises out of the good faith efforts of the District to comply with the directives of the Pima County Attorney and the Arizona Attorney General. Reliance on the Opinion of the Attorney General

⁶ Plaintiffs have not alleged any factual or doctrinal basis for their claim that the practice of the Roman Catholic faith requires attendance at a parochial high school. However, even if attendance at a parochial high school somehow is deemed a credal requirement, Plaintiffs have not demonstrated that District action has forced them to disregard their religious views and modify their behavior. James has attended public schools for at least the last three years. This pattern establishes one of two things. Either Plaintiffs' religious beliefs do not require attendance in parochial schools, or they have already made the choice not to follow such a doctrine. Accordingly, Plaintiffs' free exercise arguments are without merit.

provides the basis for insulating the members of the District Governing Board from personal liability for the improper expenditure of public funds to support sectarian activities. A.R.S. § 15-381(B).

Moreover, the grant of a preliminary injunction in this case, prior to a final determination of the parties' rights and responsibilities, may foreseeably result in other inappropriate demands from District students and residents for the provision of handicap-related services not necessary to the provision of a free appropriate public education, or demands for the provision of additional funds, services and facilities to support religious causes. These potential consequences, when considered in relation to the nonexistent claims of hardship by Plaintiffs, mandate a denial of preliminary injunction relief to Plaintiffs.

Finally, the legislative policy underlying the EHA tips the scale of equitable considerations in favor of the District. The administrative regulations promulgated pursuant to the EHA provide that during the pendency of any administrative or judicial proceedings regarding a complaint, the student involved must remain in his or her present educational placement. 34 C.F.R. § 300.513. There is no provision in James' IEP for the provision of a publicly-funded sign language interpreter in a parochial classroom. In effect, then, Plaintiffs' request for a District funded interpreter at Salpointe constitutes a request for a change in placement. As such, federal regulations mandate that, while this controversy is pending, James' placement not change.

Without regard to the Constitutional prohibition against church-state entanglements, and the obvious public policy considerations raised thereby, the legislative and administrative intent of the EHA is that James' placement (*i.e.*, receipt of an interpreter in a non-parochial classroom) remain as it is. Accordingly, public policy requires that Plaintiffs' request for a preliminary injunction be denied.

IV. PLAINTIFFS HAVE FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

Plaintiffs acknowledge that "a plaintiff must exhaust his administrative remedies under the EHA prior to bringing suit in federal court." Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction p.14. Under certain limited circumstances, either the parents of a handicapped child or the educational institution may bypass the administrative procedures prescribed by the EHA where exhaustion of the administrative remedy would be futile or inadequate. The burden, however, is upon the party seeking to avoid the administrative procedure to demonstrate the futility or inadequacy of administrative review. *Honig v. Doe*, ___ U.S. ___, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 U.S.L.W. 4091 (1988). Plaintiffs have not, however, in this case met the burden of demonstrating such futility or inadequacy.

In their Complaint and in their Application for a Preliminary Injunction, Plaintiffs request the Court to order the District to provide a sign language interpreter so James may attend a parochial high school. Plaintiffs

incorrectly contend that they need not pursue any administrative remedies because the administrative procedure could not be completed by the time school resumes. The mere fact that administrative review takes time, however, does not alone constitute inadequacy or futility. Similarly, Plaintiffs' claim that the District's written notification that a sign language interpreter would not be provided for attendance at Salpointe did not comply with the notice requirements of the EHA does not excuse Plaintiffs' failure to pursue their administrative remedies. Therefore, preliminary injunctive relief should be denied because Plaintiffs' Complaint is subject to dismissal for failure to exhaust administrative remedies.

A. There Is No Showing That Exhaustion Of Administrative Remedies In This Case Would Be Futile Or Inadequate.

It is undisputed that Plaintiffs requested no due process or other hearing procedures pursuant to the EHA prior to commencing the present action. Moreover, Plaintiffs do not dispute that, as a general rule, the failure to exhaust administrative remedies provided as part of an entitlement to appropriate special education under the EHA requires dismissal of a lawsuit brought by allegedly aggrieved parents. *See, Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982), cert denied 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Riley v. Ambach*, 668 F.2d 635 (2nd Cir. 1981); *Davenport v. Rockbridge County School Board*, F.Supp. 132 (W.D. Va.1987); *Daniel B. v. Wisconsin Department of Public Instruction*, 581 F.Supp. 585 (E.D. Wis. 1985), affirmed 776 F.2d 1051 (7th Cir. 1985). As Plaintiffs

correctly point out in their Memorandum, under circumstances where exhaustion of administrative remedies would be futile or inadequate, the failure to exhaust administrative remedies does not bar an action in court. Plaintiffs do not point out, however, that a finding of futility or inadequacy most commonly involves situations where a meaningful process of administrative review does not exist, or is improperly administered or otherwise defective, or where the complained of action involves a question of the adequacy of the procedures. *See, e.g., Kerr Center Parents' Association v. Charles*, 572 F.Supp. 448 (D.Or. 1983), supplemented 581 F.Supp. 166 (D.Or. 1983); *Davis v. District of Columbia Board of Education*, 522 F.Supp. 1102 (D.D.C. 1981), reconsideration denied, 530 F.Supp. 1209 (D.D.C. 1982); *Garrity v. Gallen*, 522 F.Supp. 171 (D.N.H. 1981); *Gary B. v. Kronin*, 542 F.Supp. 102 (N.D. Ill. 1980); *Andre H. by Lula H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y. 1985). Although there have been a few decided cases not based on a claim of defective administrative procedures which have excused an aggrieved party from pursuing administrative remedies prior to filing an action in court, these cases are based on unique actual circumstances. This type of exceptional situation is not present in the case now before this Court. Plaintiffs are unable to make any showing that pursuing administrative remedies in this situation would be either futile or inadequate.⁷

⁷ Regulations promulgated pursuant to the EHA provide that Plaintiffs may request a hearing to challenge a change in placement or a refusal to change placement pursuant to parental request. 34 C.F.R. § 300.506. These hearings are required to be conducted before an impartial hearing officer, 34 C.F.R.

The District's decision to deny Plaintiffs' request for an interpreter for classes at a Catholic high school was based on the opinion of the Pima County Attorney. A copy of that opinion was supplied to Plaintiffs. It was the opinion of the Pima County Attorney that the District could not constitutionally provide the services requested by Plaintiff "if a publicly funded interpreter provides a conduit for the transmission of sectarian views to a student attending a non-public parochial school." Opinion of the Pima County Attorney, Opinion No. 88-04 dated April 26, 1988, a copy of which is attached to Plaintiffs' Verified Complaint. The justification for this conclusion, as explained in that Opinion, is that the provision of such services may result in excessive entanglement of church and state. Whether provision of a sign language interpreter for James while he attends Salpointe would actually result in such excessive entanglement presents a factual issue which could, and should, be reviewed in an administrative proceeding. Specifically, issues such as whether, and to what extent, religious discussions or indoctrination occur in the course of ordinary academic instruction easily could be considered and decided in administrative proceedings. Because Plaintiffs have failed to exhaust their administrative remedies, their Complaint must be dismissed.⁸

§ 300.507, and may be appealed to the state educational agency before proceeding to litigation. 34 C.F.R. § 300.510. There is no suggestion that these administrative procedures are insufficient to afford Plaintiffs the proper due process protections without first resorting to litigation.

⁸ Plaintiffs suggest that they somehow are excused from the Due Process requirement because they received the District's

B. Plaintiffs Are Not Excused From The Administrative Review Process Due To Inadequate Notice.

Plaintiffs seem to contend the District's notification to Plaintiffs of its decision not to provide an interpreter for James if he attends Salpointe was technically defective, therefore excusing them from the requirement that they exhaust administrative remedies prior to filing a court action. If this is Plaintiffs' position, for various reasons, they are incorrect.

Plaintiffs seem to argue that they need not pursue administrative remedies because the notification they were given did not specifically describe the available administrative procedures. The authority cited for this proposition, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), affirmed and modified; *Honig v. Doe*, ___ U.S. ___, 108 S.Ct. 592, 98 L.Ed.2d 686, 56 U.S.L.W. 4091 (1988), is

notice after July 11, 1988, because they allege they were unaware of their rights, and because Plaintiffs allege they received no other written communications in this matter. Despite Plaintiffs' protestations, however, they were continuously and periodically informed by the District of the status of the legal inquiries into their request, and Plaintiffs received copies of all correspondence related to this matter. Moreover, the fact that the "final" notice was not prepared until July 11, 1988, does not affect Plaintiffs' ability to request a due process hearing at any time before or after the July 11, 1988, notice. Finally, Plaintiffs had notice of their rights under the EHA, many of which were stated on a Review of Placement form for James which was signed by Sandra Zobrest on February 10, 1988. See Review of Placement dated February 10, 1988, attached hereto as Exhibit A.

distinguishable from this case and does not legally support Plaintiffs' position. In *Doe v. Maher*, the school district reduced a handicapped student's schedule from full time to half time because of the student's misconduct, but *completely* failed to notify the student's guardians of the change or of any available safeguards or avenue for review. In the present situation, Plaintiffs were fully advised of the District's decision and of the reasons for that decision.

Moreover, the District gave Plaintiffs notice that adequately complied with the EHA. See, *Gregg B. v. Board of Ed. of Lawrence School District*, 535 F.Supp. 1333 (E.D.N.Y. 1982). In *Gregg B.*, a letter to the parents' attorney that the child's placement at a particular school would not be recommended because the school did not have state approval was held to comply with the notice requirements of the EHA. In addition, even if the notice was technically defective because it did not specifically describe the available review procedures, this was not prejudicial to the Plaintiffs. The Plaintiffs admit in their Memorandum that they became aware of the review procedures when they retained counsel, if not earlier. This was within days or weeks of receiving the July 11, 1988, notification from the District, assuming Plaintiffs did not retain counsel prior to receiving District notification. During the time that Plaintiffs prepared and filed the present complaint and lengthy petition for injunctive relief, they could have invoked the due process procedures prescribed pursuant to the EHA. Therefore, it is inconceivable that the Zobrests suffered any prejudice, even if there had been a technical defect in the notice. Considering the alternative avenues of relief available to

Plaintiffs, which as a matter of law and judicial policy should be pursued prior to litigation, Plaintiffs' request for preliminary injunctive relief is inappropriate.

For the foregoing reasons, Defendant Catalina Foothills School District respectfully requests that Plaintiffs' petition for preliminary injunctive relief be denied.

DATED this 11th day of August, 1988.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By /s/ John C. Richardson
John C. Richardson
Gary F. Urman
2525 East Broadway
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendants

Copy of the foregoing hand
delivered this 11th day of
August, 1988, to:

Honorable Richard M. Bilby
Chief Judge
55 East Broadway
Tucson, Arizona 85701

Tom Berning
Arizona Center for Law in
the Public Interest
3208 East Ft. Lowell
Suite 106
Tucson, Arizona 85716

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LARRY ZOBREST and)	
SANDRA ZOBREST husband and	)	NO. CIV 88-516
wife, etc., et al	)	TUC-RMB
Plaintiffs,)	
	)	ORDER
vs.	)	(Filed
CATALINA FOOTHILLS	)	Aug. 15, 1988)
SCHOOL DISTRICT,)	
Defendants.)	
_____)	

This Order contains the Court's disposition of the Plaintiffs' Motion for Preliminary Injunction taken under advisement following the hearing on August 12, 1988.

Based upon the stipulated facts in the record, the Court holds that the Motion must be denied on the ground that there is no likelihood of success on the merits. *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197 (9th Cir. 1980).

In reaching this holding, the Court determines that the role of the sign language interpreter is more analogous to that of a therapist than to that of a diagnostician. The interpreter would be more involved in the pervasively sectarian environment and would be the conduit of both sectarian and nonsectarian information. Therefore, this practice would impermissibly violate the separation of church and state. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977).

Therefore, IT IS ORDERED that the Plaintiffs' Motion for Preliminary Injunction is DENIED.

DATED this 12 day of August, 1988.

/s/ Richard M. Bilby
RICHARD M. BILBY
United States District Judge

DECONCINI McDONALD BRAMMER YETWIN & LACY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2525 EAST BROADWAY BOULEVARD, SUITE 200
TUCSON, ARIZONA 85716-5303
(602) 322-5000

John C. Richardson, Esq.
State Bar No. 005606
Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST husband and wife;)	
JAMES ZOBREST, a minor, by	)	No. CIV 88-516
LARRY and SANDRA ZOBREST,	)	TUC-RMB
his parents,)	
)	
Plaintiffs,	)	ANSWER
)	
vs.)	
)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
_____)	

Defendant Catalina Foothills School District, whose correct name is Catalina Foothills School District No. 16 of Pima County, by and through counsel undersigned, answers Plaintiffs' Complaint as follows:

1. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 1 of Plaintiffs' Complaint, and therefore denies same.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiffs' Complaint, and therefore denies same. Defendant denies that the Court may grant an injunction under these circumstances.

3. Defendant admits the allegations contained in Paragraphs 3 and 4 of Plaintiff's Complaint, except that Defendant's proper name is Catalina Foothills School District No. 16 of Pima County.

4. In response to paragraph 5 of Plaintiffs' Complaint, Defendant is without information sufficient to form a belief as to James Zobrest's enrollment in Salpointe Catholic High School, and therefore denies same. Defendant admits the remaining allegations contained in Paragraph 5 of Plaintiffs' Complaint.

5. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 6, 7 and 8 of Plaintiffs' Complaint, and therefore denies same.

6. Defendant admits the allegations contained in Paragraphs 9 and 10 of Plaintiffs' Complaint.

7. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 11, 12, 13 and 14 of Plaintiffs' Complaint, and therefore denies same.

8. Defendant denies the allegation contained in Paragraph 15 of Plaintiffs' Complaint, as it is worded. Defendant affirmatively admits that, in October or November of 1987, Plaintiffs orally requested the District

to furnish James Zobrest the services of a sign language interpreter.

9. Defendant admits the allegations contained in Paragraph 16 of Plaintiffs' Complaint.

10. Defendant admits the allegations contained in Paragraph 17 of Plaintiffs' Complaint.

11. Defendant admits the allegations contained in Paragraph 18 of Plaintiffs' Complaint.

12. Defendant is without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' Complaint, and therefore denies same.

13. Defendant denies the allegations contained in Paragraphs 20, 21, and 22 of Plaintiffs' Complaint.

14. In response to Paragraph 23 of Plaintiffs' Complaint, Defendant realleges all admissions, denials and allegations as set forth herein.

15. Defendant denies the allegations contained in Paragraphs 24, 25, 26 and 27 of Plaintiffs' Complaint.

16. Defendant denies all allegations not specifically admitted herein.

17. Defendant affirmatively alleges that it is without legal authority to provide to Plaintiffs the services requested in Plaintiffs' Complaint, and that Plaintiffs have failed to state a claim upon which relief may be requested.

18. As affirmative defenses, Defendant alleges illegality, failure to exhaust administrative remedies, and

any other matter which should be asserted as an affirmative defense which is uncovered during discovery in this case.

WHEREFORE, Defendant requests as follows:

1. That Plaintiffs take nothing by their Complaint and that the Complaint be dismissed;

2. That the Court award to Defendant its costs incurred herein; and

3. For such other and further relief as the Court deems just and proper.

Respectfully submitted this 23rd day of August, 1988.

DECONCINI McDONALD BRAMMER
YETWIN & LACY P.C.

By /s/ John C. Richardson
John C. Richardson
2525 East Broadway
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendant

Copy of the foregoing mailed
this 23rd day of August,
1988, to:

Arizona Center for Law
in the Public Interest
3208 East Ft. Lowell
Suite 106
Tucson, Arizona 85716
Attorneys for Plaintiffs
0822880400.GFU. 880457

Tom Berning - #005370
 Arizona Center for Law
 in the Public Interest
 3208 East Fort Lowell
 Suite 106
 Tucson, Arizona 85716
 (602) 327-9547

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT FOR ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor,	)	No. CIV 88-516
by LARRY and SANDRA)	
ZOBREST, his parents,	)	NON-UNIFORM
	)	INTERROGATO-
Plaintiffs,	)	RIES
v.)	
CATALINA FOOTHILLS	)	AND ANSWERS
SCHOOL DISTRICT,	)	THERETO
Defendants.)	

TO: DEFENDANT AND THEIR ATTORNEY OF
 RECORD, JOHN RICHARDSON

Pursuant to Rule 33 of the Federal Rules of Civil
 Procedure you are hereby requested to answer in writing
 and under oath within 30 days of service hereof the
 interrogatories contained on the attached Exhibit 'A'.

DATED this 1st day of Nov., 1988.

/s/ Tom Berning
Tom Berning

Arizona Center for Law
 in the Public Interest
 3208 East Fort Lowell
 Suite 106
 Tucson, Arizona 85716

Attorney for Plaintiffs

A copy of the foregoing was mailed first
 class postage pre-paid this 1st day
 of Nov., 1988 to:

John Richardson
 DeConcini, McDonald, Brammer,
 Yetwin & Lacy, P.C.
 2525 East Broadway
 Tucson, Arizona 85716-5303

/s/ T. Berning

EXHIBIT 'A'

1. Please state factual basis for the defense of "ille-
 gality" as stated in paragraph 18 of defendant's Answer.

James Zobrest attends Salpointe Catholic High School, a
 private-parochial school, and has requested Defendant to
 provide him the services of a sign language interpreter
 while at that school. Pursuant to the establishment clause
 of the first amendment to the United States Constitution,
 it is unlawful for the District to provide James Zobrest the
 services of a sign language interpreter at Salpointe Catho-
 lic High School.

2. Please state the reasons why defendant refuses to provide plaintiff James Zobrest with a certified sign language interpreter at Salpointe High School.

See answer to Interrogatory No. 1, above.

3. Please list each exhibit which defendant intends to utilize in evidence at the trial on the merits in this matter.

See Attachment A

4. Please list the name, address, phone number, and occupation of each person defendant intends to call as a witness at the trial on the merits in this matter.

See Attachment A

5. If you have denied any of plaintiffs' Requests for Admissions which have been served contemporaneously with these interrogatories, please explain the reason why you have denied the request.

See Attachment B

6. Does defendant school district have any written policies concerning the provision of special education services for district children attending parochial schools? No. The only school policies located by the Defendant School District following a brief review of its policy book relating to religious instruction at all are attached. Plaintiff is free to review the policy book of the Defendant School District at any reasonable time with advance notice. Counsel for the Defendant School District will maintain a copy of this policy book in his office.

7. If the answer to interrogatory No. 6 is in the affirmative, please summarize the written policy.

See answer to number 6 above.

8. Do defendants believe that plaintiffs' decision to enroll James Zobrest at Salpointe Catholic High School is not motivated by a sincere religious belief? No. If the answer is yes, please explain the factual basis for defendant's belief.

ATTACHMENT B

Answer to Interrogatory No. 5: —

In response to Request for Admission No. 4, Defendant admits that Plaintiff James Zobrest is a handicapped person within the meaning of EHA and thus, to the extent required by the EHA and to the extent permitted in light of constitutional limitations such as the First Amendment to the United States Constitution, he is entitled to receive special education services. The Defendant School District denies that Plaintiff is entitled to receive certain special education services at Salpointe High School (such as the provision of an interpreter) because such action would violate the first amendment to the United States Constitution.

In response to Request for Admission No. 5, Defendant Catalina Foothills School District admits that Plaintiff James Zobrest requires the services of a sign language interpreter in order to "benefit" from the regular classroom instruction he receives. James Zobrest does not use an interpreter during the special education instruction.

/s/ John C. Richardson
John C. Richardson

/s/ Lesley A. Jenner
Notary Public

Mr. William B. Ball
BALL SKELLY MURREN & CONNELL

LARRY ZOBREST and) No. CIV 88-516
SANDRA ZOBREST, husband) TUC-RMB
and wife; JAMES ZOBREST,)
a minor, by LARRY and) AFFIDAVIT
SANDRA ZOBREST, his) (Filed June 6, 1989)
parents,)
Plaintiffs,)
v.)
CATALINA FOOTHILLS)
SCHOOL DISTRICT,)
Defendants.)

2. My husband, my child, James, and I are members of the Roman Catholic Church and believers in the faith and teachings of the Church.

3. Our son James is now 15 years of age and has arrived at what we deem to be the most critically important time of his life, the most sensitive of his formative years. We believe that the high school years are a stage of a child's life when his character, moral outlook, and religious beliefs are principally formed. Today it is unfortunately a time when all of those things are threatened, more than they ever were, by evils which are rampant in our society.

4. While we were content to have our son enrolled in a public, non-religious school during part of his grade school years, we believed it essential to enroll him in a school of our religious faith for his high school years.

5. Salpointe Catholic High School is a pervasively religious school which, while providing an education to children which meets all state standards, also inculcates the moral and religious principles of the Catholic Faith.

6. While a public high school has been available to us, we have enrolled our son at Salpointe for this religious reason, in that, we have no choice. Salpointe Catholic High School is not a mere matter of preference for us: we are forced, by our religious conscience, to choose that school for James. It is also our sons religious preference that he attend Salpointe.

7. James is a handicapped child. He has been profoundly deaf since birth. Since he can hear nothing, he cannot participate in schooling without the services of an interpreter using sign language. The need for such services are reflected on his latest Individual Education Plan (IEP). I was present when the IEP was drafted and signed. A copy is attached as Exhibit "A".

8. In October, 1987, my husband and I requested that, pursuant to the provisions of federal and state law for educational aid to the handicapped, the Catalina Foothills School District furnish James, at Salpointe Catholic High School, the services of a certified sign language interpreter. The School District has declined on the basis of an opinion of the Attorney General of Arizona, that the furnishing of such services on the premises of a religious school, is forbidden by the United States and Arizona Constitutions.

9. As a consequence my husband and I have been forced to hire a certified sign language interpreter for our son. The cost of this to us is somewhat over \$7,000 per year. We pay \$2,000, per year for tuition and an additional sum for books, supplies, etc. Salpointe Catholic High School, which is not supported by public funds, cannot afford to provide interpreter services to our son.

/s/ Sandra Zobrest
Sandra Zobrest

STATE OF ARIZONA)
COUNTY OF PIMA)

SUBSCRIBED AND SWORN TO before me this 30 day of May 1989.

/s/ Carla Johns
NOTARY PUBLIC

My Commission Expires:

DeCONCINI McDONALD BRAMMER YETWIN & LACY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
2525 EAST BROADWAY BOULEVARD SUITE 200
TUCSON, ARIZONA 85716-5303
(602) 322-5000

John C. Richardson, Esq.
State Bar No. 005606
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

LARRY ZOBREST and	)	No. CIV 88-516
SANDRA ZOBREST,	)	TUC RMB
husband and wife;)	
JAMES ZOBREST, a minor,	)	STIPULATION
by LARRY and SANDRA	)	CONCERNING
ZOBREST, his parents,	)	SUBSTITUTION OF
	)	ALTERNATE
Plaintiffs,	)	AFFIDAVIT
)	
v.)	
CATALINA FOOTHILLS)	
SCHOOL DISTRICT,)	
)	
Defendants.)	
)	

The parties to this action, by and through their attorneys, hereby stipulate and agree as follows:

1. Plaintiffs have recently filed a Motion for Summary Judgment. Along with the filing of such Motion, Plaintiffs filed an Affidavit of Sandra Zobrest dated February 17, 1989 (the "Original Affidavit").

2. Counsel for Defendant has informed counsel for Plaintiffs that Defendant contests certain language in the Original Affidavit concerning the alleged economic impact upon Plaintiffs of being required to pay for a sign language interpreter for James Zobrest. Counsel for Defendant has discussed with counsel for Plaintiffs the possible need to engage in additional discovery on the issue of Plaintiffs' financial status so as to enable Defendant to attempt to contest the facts relating to this issue contained in the Original Affidavit.

3. Both parties agree that discovery on this issue would be expensive, time consuming, and undesirable. Both parties also agree that the statements contained in the Original Affidavit about which Defendant objects, whether accurate or inaccurate, are unnecessary for a resolution of this action.

4. The parties therefore agree that Sandra Zobrest will submit to the Court a revised affidavit omitting the language about which Defendant has raised a concern (the "Revised Affidavit"). The Revised Affidavit will omit the final two sentences of Paragraph 9 of the Original Affidavit, but in all other respects be identical thereto. The parties further agree that for the purpose of this litigation, the Original Affidavit shall be considered withdrawn and shall no longer be considered to have any force or effect.

5. By executing this Stipulation, Defendant Catalina Foothills School District neither admits nor denies the accuracy or inaccuracy of any other statement or conclusion contained in the Original or Revised Affidavits of Sandra Zobrest. By executing this Stipulation and the

Revised Affidavit, the Plaintiffs neither admit nor deny the accuracy or inaccuracy of any statement in the Original Affidavit.

DATED this 30th day of May, 1989.

DeCONCINI McDONALD
BRAMMER YETWIN & LACY,
P.C.

By _____
John C. Richardson
2525 East Broadway,
Suite 200
Tucson, Arizona 85716-5303
Attorneys for Defendant

DATED this 30th day of May, 1989.

ARIZONA CENTER FOR LAW IN
THE PUBLIC INTEREST

By _____
Tom Berning
3208 East Fort Lowell,
Suite 106
Tucson, Arizona 85716
BALL, SKELLY, MURREN &
CONNEL

By _____
William B. Ball
511 North Second Street
P.O. Box 1108
Harrisburg, Pennsylvania 17108
Attorneys for Plaintiffs

AFFIDAVIT

STATE OF ARIZONA)
) ss
County of Pima)

I, James Santeford, being first duly sworn, do hereby depose and say:

1. I am *twenty-three years of age.
2. I reside at 5502 South Santa Cruz, Tucson, Arizona 85706.
3. Since August, 1988 I have been employed by Sandra and Larry Zobrest as a sign language interpreter for their son James Zobrest.
4. I interpret for James while he is engaged in activities at Salpointe Catholic High School. I also interpret for James during his extra-curricular activity of basketball for Salpointe.
5. I have been certified as a Level III sign language interpreter by the Interpreter Quality Assurance System (IQAS). This is the only entity in Arizona that certifies sign language interpreters for the deaf. IQAS is affiliated with the Registry of Interpreters for the Deaf, Inc. (RID, Inc.). A copy of my certification card is attached hereto as Exhibit "A".
6. In my capacity as a sign language interpreter I adhere to the Code of Ethics set forth by RID, Inc. Attached hereto as Exhibit "B" are copies of the Code of Ethics and the Code of Professional Conduct published by RID, Inc., which I follow in my interpreting activities.

Further affiant sayeth not.

Dated this 30th day of March, 1989.

/s/ James Santeford
James Santeford

Subscribed and sworn to before me this 30th day of March, 1989.

/s/ Olivia Hanson
Notary Public

OFFICIAL SEAL
OLIVIA HANSON
NOTARY PUBLIC STATE OF ARIZONA
PIMA COUNTY
My Comm. Expires Sept. 30, 1992

Appendix A

Registry of Interpreters for the Deaf, Inc. Code of Ethics

The Registry of Interpreters for the Deaf, Inc. refers to individuals who may perform one or more of the following services:

Interpret

Spoken English to American Sign Language
American Sign Language to Spoken English

Transliterate

Spoken English to Manually Coded English/
Pidgin Sign English

Manually Coded English/Pidgin Sign English to
Spoken English
Spoken English to paraphrased non-audible
spoken English.

Gesticulate/Mime, etc.

Spoken English to Gesture, Mime, etc.
Gesture, Mime, etc., to Spoken English

The Registry of Interpreters for the Deaf, Inc. has set forth the following principles of ethical behavior to protect and guide the interpreter/transliterator, the consumers (hearing and hearing-impaired) and the profession, as well as to ensure for all, the right to communicate.

This Code of Ethics applies to all members of the Registry of Interpreters for the Deaf, Inc. and all certified non-members.

While these are general guidelines to govern the performance of the interpreter/transliterator generally, it is recognized that there are ever increasing numbers of highly specialized situations that demand specific explanation. It is envisioned that the R.I.D., Inc. will issue appropriate guidelines.

CODE OF ETHICS

INTERPRETER/TRANSLITERATOR SHALL KEEP ALL
ASSIGNMENT-RELATED INFORMATION STRICTLY
CONFIDENTIAL.

Guidelines:

Interpreter/transliterator shall not reveal information about any assignment, including the fact that the service is being performed.

Even seemingly unimportant information could be damaging in the wrong hands. Therefore, to avoid this possibility, interpreter/transliterators must not say anything about any assignment. In cases where meetings or information becomes a matter of public record, the interpreter/transliterators shall use discretion in discussing such meetings or information.

Exhibit "B"

If a problem arises between the interpreter/transliterators and either person involved in an assignment, the interpreter/transliterators should first discuss it with the person involved. If no solution can be reached, then both should agree on a third person who could advise them.

When training new trainees by the method of sharing actual experiences, the trainers shall not reveal any of the following information:

- name, sex, age, etc., of the consumer

- day of the week, time of the day, time of the year the situation took place

- location, including city, state or agency

- other people involved

- unnecessary specifics about the situation

it only takes a minimum amount of information to identify the parties involved.

INTERPRETER/TRANSLITERATORS SHALL RENDER THE MESSAGE FAITHFULLY, ALWAYS CONVEYING THE CONTENT AND SPIRIT OF THE SPEAKER, USING

LANGUAGE MOST READILY UNDERSTOOD BY THE PERSONS(S) WHOM THEY SERVE.

Guidelines:

Interpreter/transliterators are not editors and must transmit everything that is said in exactly the same way it was intended. This is especially difficult when the interpreter disagrees with what is being said or feels uncomfortable when profanity is being used. Interpreter/transliterators must remember that they are not at all responsible for what is said, only for conveying it accurately. If the interpreter/transliterators's own feelings interfere with rendering the message accurately, he/she shall withdraw from the situation.

While working from Spoken English to Sign or non-audible spoken English, the interpreter/transliterators should communicate in the manner most easily understood or preferred by the deaf and hard-of-hearing person(s), be it American Sign Language, Manually Coded English, fingerspelling, paraphrasing in non-audible spoken English, gesturing, drawing, or writing, etc. It is important for the interpreter/transliterators and deaf or hard-of-hearing person(s) to spend some time adjusting to each other's way of communicating prior to the actual assignment. When working from Sign or non-audible spoken English, the interpreter/transliterators shall speak the language used by the hearing person in spoken form, be it English, Spanish, French, etc.

INTERPRETER/TRANSLITERATORS SHALL NOT COUNSEL, ADVISE, OR INTERJECT PERSONAL OPINIONS.

Guidelines:

Just as interpreter/transliterators may not omit anything which is said, they may not add anything to the situation, even when they are asked to do so by other parties involved.

An interpreter/transliterators is only present in a given situation because two or more people have difficulty communicating, and thus the interpreter/transliterators's only function is to facilitate communication. He/she shall not become personally involved because in so doing he/she accepts some responsibility for the outcome, which does not rightly belong to the interpreter/transliterators.

INTERPRETER/TRANSLITERATORS SHALL ACCEPT ASSIGNMENTS USING DISCRETION WITH REGARD TO SKILL, SETTING, AND THE CONSUMERS INVOLVED.

Guidelines:

Interpreter/transliterators shall only accept assignments for which they are qualified. However, when an interpreter/transliterators shortage exists and the only available interpreter/transliterators does not possess the necessary skill for a particular assignment, this situation should be explained to the consumer. If the consumers agree that services are needed regardless of skill level, then the available interpreter/transliterators will have to use his/her judgment about accepting or rejecting the assignment.

Certain situations may prove uncomfortable for some interpreter/transliterators and clients. Religious, political, racial or sexual differences, etc., can adversely affect the facilitating task. Therefore, an interpreter/transliterators shall not accept assignments which he/she knows will involve such situations.

Interpreter/transliterators shall generally refrain from providing services in situations where family members, or close personal or professional relationships may affect impartiality, since it is difficult to mask inner feelings. Under these circumstances, especially in legal settings, the ability to prove oneself unbiased when challenged is lessened. In emergency situations, it is realized that the interpreter/transliterators may have to provide services for family members, friends, or close business associates. However, all parties should be informed that the interpreter/transliterators may not become personally involved in the proceedings.

INTERPRETER/TRANSLITERATORS SHALL REQUEST COMPENSATION FOR SERVICES IN A PROFESSIONAL AND JUDICIOUS MANNER.

Guidelines:

Interpreter/transliterators shall be knowledgeable about fees which are appropriate to the profession, and be informed about the current suggested fee schedule of the national organization. A sliding scale of hourly and daily rates has been established for interpreter/transliterators in many areas. To determine the appropriate fee, interpreter/transliterators should know their own level of skill, level of certification, length of experience,

nature of the assignment, and the local cost of living index.

There are circumstances when it is appropriate for interpreter/translators to provide services without charge. This should be done with discretion, taking care to preserve the self-respect of the consumers. Consumers should not feel that they are recipients of charity. When providing *gratis* services, care should be taken so that the livelihood of other interpreter/translators will be protected. A free-lance interpreter/translator may depend on this work for a living and therefore must charge for services rendered, while persons with other full-time work may perform the service as a favor without feeling a loss of income.

INTERPRETER/TRANSLATORS SHALL FUNCTION IN A MANNER APPROPRIATE TO THE SITUATION.

Guidelines:

Interpreter/translators shall conduct themselves in such a manner that brings respect to themselves, the consumers and the national organization. The term "appropriate manner" refers to:

- (a) dressing in a manner that is appropriate for skin tone and is not distracting.
- (b) conducting oneself in all phases of an assignment in a manner befitting a professional.

INTERPRETER/TRANSLATORS SHALL STRIVE TO FURTHER KNOWLEDGE AND SKILLS THROUGH PARTICIPATION IN WORKSHOPS, PROFESSIONAL MEETINGS, INTERACTION WITH PROFESSIONAL COLLEAGUES AND READING OF CURRENT LITERATURE IN THE FIELD.

INTERPRETER/TRANSLATORS, BY VIRTUE OF MEMBERSHIP IN OR CERTIFICATION BY THE R.I.D., INC. SHALL STRIVE TO MAINTAIN HIGH PROFESSIONAL STANDARDS IN COMPLIANCE WITH THE CODE OF ETHICS.

October 1979

Appendix B

AIIC

CODE OF PROFESSIONAL CONDUCT

1983 VERSION

Code of Professional Conduct (English translation of original French version)

ASSOCIATION INTERNATIONALE DES INTERPRETES
DE CONFERENCE
INTERNATIONAL ASSOCIATION OF
CONFERENCE INTERPRETERS

I. PURPOSE AND SCOPE

Article 1

a) This Code of Professional Conduct and Practice (hereinafter called "the Code") lays down the conditions governing the practice of the professional by members of the Association.

b) Members are bound by the provisions of the Code. The Council, with the assistance of the Association's members, shall ensure compliance with the provisions of the Code.

c) Candidates for admission shall undertake to adhere strictly to the provisions of the Code and all other AIIIC rules.

d) Penalties, as provided in the Statutes, may be imposed on any member who infringes the rules of the profession as laid down in the Code.

II. CODE OF ETHICS

Article 2

a) Members of the Association shall be bound by the strictest secrecy, which must be observed towards all persons with regard to information gathered in the course of professional practice at non-public meetings.

b) Members shall not derive any personal gain from confidential information acquired by them in the exercise of their duties as interpreters.

Article 3

Members of the Association shall not accept engagements for which they are not qualified. Their acceptance shall imply a moral undertaking on their part that they will perform their services in a professional manner.*

Article 4

a) Members of the Association shall not accept any employment or situation which might detract from the dignity of the profession or jeopardize the observance of secrecy.

b) They shall refrain from any conduct which might bring the profession into disrepute, and particularly from any form of personal publicity. They may, however, for professional reasons advertise the fact that they are conference interpreters and members of the Association.

Article 5

a) It shall be the duty of members of the Association to afford their colleagues moral assistance and solidarity.

b) Members shall refrain from statements or actions prejudicial to the interests of the Association or its members. Any disagreement with the decisions of the Association or any complaint about the conduct of another

*The moral undertaking given by AIIIC members under article 3 of the Code of Professional Conduct shall apply equally to the performance of services by interpreters who are not members of AIIIC but are engaged through a member.

member shall be raised and settled within the Association itself.

c) Any professional problem which arises between two or more members of the Association may be referred to the Council for arbitration.

d) As regards candidates, however, infringements of the Code or other rules of the Association shall be adjudicated by the Admissions and Language Classification Committee.

Article 6

Members of the Association shall not accept, and still less offer, conditions of work which do not meet the standards laid down in the Code, either for themselves or for interpreters engaged through them.

[Editor's Note: This portion of the AIIIC Code is reproduced by permission.]

EXHIBIT A

SALPOINTE CATHOLIC HIGH SCHOOL

* * *

TRANSPORTATION

As a community school, serving the Greater Tucson Area, Salpointe Catholic is easily accessible through various forms of transportation. For students who do not drive or do not belong to a car pool, the school offers information concerning Tucson Transit Lines and Pima County RideShare.

ACADEMIC PROGRAM

Academic excellence is the trademark of Salpointe Catholic High School. The school is accredited as a college preparatory school by the North Central Association of Colleges and Schools. The academic achievements of our present students, as well as an overwhelming number of our graduates, indicate the strength and fullness of Salpointe Catholic's academic programs. Because over 93% of our graduates do in fact continue their education beyond high school, Salpointe Catholic must provide the necessary motivation and preparation for higher educational success. Our graduation requirements are therefore stricter than other schools in order to assure that each student has the proper preparation for college.

GRADUATION REQUIREMENTS

The Salpointe Catholic curriculum should be viewed as a four-year experience during which the student must accumulate 22 credits to be graduated. However, students are encouraged to opt for 24 credits. Beginning with the class of

1991, an additional religion credit has been added. To meet the needs of students, Salpointe Catholic offers three distinct academic programs, each with a different number of elective options.

1. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	3	Credits
Foreign Language	3	Credits
Religion	3	Credits
Electives	5	Credits
Total Credits	24	
2. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	2	Credits
Foreign Language	2	Credits
Religion	3	Credits
Electives	7	Credits
Total Credits	24	
3. English	4	Credits
Social Science	3	Credits
Mathematics	3	Credits
Science	2	Credits
Religion	3	Credits
Electives	9	Credits
Total Credits	24	

CREDIT ACCUMULATION

Courses carrying 1 credit meet every day for the entire year. Courses carrying .5 credit may meet every day for an entire semester or alternate days for an entire year. A failure in the first semester may be changed to a D at the department's discretion if the student's work improves to an A or B during the second semester. Students are responsible for

keeping their credits up-to-date, and should refer to the course catalog or their counselor whenever a question arises. Salpointe provides the opportunity and resources for all students to plan and carry out an academic program that meets their needs. Students must, however, avail themselves of these opportunities and take responsibility for their own education. A student who is missing two or more classes (1.0 or more credits), will not be allowed to participate in the graduation exercises.

COURSE LOAD REQUIREMENTS

Freshmen and sophomores are scheduled for six classes. Juniors may take five classes if they have earned 12 credits by the end of sophomore year. Seniors must take enough courses to supply 22 credits by graduation. For example, a senior who has earned 17.5 credits by the end of the junior year must carry 4.5 credits. A student may not register for fewer than 4 credits (4 courses per semester) or more than 6 credits during an academic year. To be promoted to the next grade, students must have the following credits (including all required subjects): 5 credits by the end of freshman year; 10 credits by the end of sophomore year; 16 credits by the end of junior year. Students who are lacking more than 2 credits in any given school year may not return to Salpointe Catholic the following fall semester. Summer school is "a must" for all students who fail any required course(s) and/or more than 1 credit of elective courses. Students who do not repeat and pass these courses during summer school will not be readmitted. It is the summer school student's obligation to have a transcript sent to Salpointe Catholic before school opens in the fall. The required subjects at Salpointe are: (1) all English, Religion, and Social Studies courses;

(2) the first courses in Mathematics; (3) the first two courses in Science.

SUMMER SCHOOL AND OFF-CAMPUS COURSES

In some cases, with prior permission of the Academic Assistant Principal, courses may be taken for Salpointe credit at the University of Arizona and/or Pima Community College.

Summer courses may be taken at any accredited high school or Pima Community College. Students must first secure the necessary forms from the Academic Assistant Principal before enrolling for any summer school courses. Credit for enrichment courses during the summer may be accepted at the discretion of the Academic Assistant Principal. Students should discuss their summer school plans with the Academic Assistant Principal in order to be assured that the credit is accepted at Salpointe Catholic. In general, our policy is to permit supplemental courses for the following reasons: (1) The student cannot fit a desired course into his/her daily schedule. (2) The course is not offered at Salpointe Catholic.

COURSE SELECTION AND CHANGES

Choosing an appropriate program of studies is an important part of each student's high school responsibilities. Parents are encouraged to participate actively in the yearly process of selecting courses that meet the needs of their son/daughter. Alternate courses should also be selected to assist in the scheduling process. Some administrative schedule adjustments may be unavoidable. After a student has been duly registered and has received his/her schedule, he/she

may not change that schedule without prior approval of the Academic Assistant Principal and payment of a \$25 fee (unless the change has been necessitated by an office error). Schedule changes or course drops are permitted only as an exception when one of the following criteria is met: (1) doctor's request (in writing) or teacher's recommendation based on student ability (unless a waiver has been signed); (2) desire to add a course during a free period (if space is available); (3) desire to take a heavier academic load (if space is available); (4) work permit or other such circumstances (letter from employer is required stating the hours and days of work) requesting early dismissal or lighter load; (5) course in question was a second or third choice assigned during scheduling (if space in the first choice is available). Courses will not be dropped simply because they are not needed for graduation. All schedule changes must be approved in writing by the parents of the student.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST and SANDRA)	
ZOBREST, husband and wife;)	
JAMES ZOBREST, a minor, by	)	No. CIV 88-516
LARRY and SANDRA ZOBREST,	)	TUC-RMB
his parents,)	
Plaintiffs,)	
v.)	
CATALINA FOOTHILLS	)	STIPULATION
SCHOOL DISTRICT,	)	OF FACTS
Defendants.)	

The plaintiffs and the defendant, by their attorneys, hereby stipulate and agree that the following is a correct statement of the facts and this litigation:

I. BACKGROUND FACTS AND PARTIES.

1. The plaintiff, JAMES ZOBREST, is a child 14 years of age, who resides with his parents, plaintiffs LARRY ZOBREST and SANDRA ZOBREST, at 5740 N. Chieftan Trail, Tucson, Arizona 85715.

2. Catalina Foothills School District is a public unified school district operating pursuant to Title 15 of the Arizona Revised Statutes. Catalina Foothills School District does not, at the present time, operate or maintain a high school. High school age students residing in Catalina Foothills School District may legally attend any public high school in Arizona, and the tuition therefore is paid by Catalina Foothills School District.

3. The plaintiff James Zobrest and his parents, plaintiffs Larry Zobrest and Sandra Zobrest, are individuals of the Roman Catholic faith.

4. The plaintiff James Zobrest fulfills the requirements of the Arizona compulsory school attendance statute, A.R.S. § 15-802, through attendance at Salpointe Catholic High School.

5. All the plaintiffs reside within the boundaries of Catalina Foothills School District.

6. James Zobrest was born deaf and remains profoundly deaf.

7. James Zobrest is, as of March 1989, enrolled in the ninth grade of Salpointe Catholic High School ("Salpointe"), Tucson, Arizona.

8. Salpointe is located within the boundaries of Amphitheater Unified School District, Tucson, Arizona.

9. Catalina Foothills School District does not pay tuition charges for James Zobrest to attend Salpointe.

10. James Zobrest is a "handicapped person" within the meaning of the Education of The Handicapped Act, 20 U.S.C. § 1401 *et seq.* (the "EHA").

11. Pursuant to the EHA, James Zobrest receives speech therapy services, two times a week for periods of 45 minutes each, from Catalina Foothills School District. The speech therapy services are provided at Orange Grove Junior High School, in Catalina Foothills School District.

12. James Zobrest requires the services of a sign language interpreter in order to obtain the benefit of the regular classroom instruction he receives at Salpointe.

13. Catalina Foothills School District would be obligated under the EHA to pay the cost of a certified sign language interpreter for James Zobrest if he were enrolled in a local public high school.

14. James Zobrest had received all of his education prior to the sixth grade in schools for the deaf including the Arizona School for the Deaf and for the Blind. He attended grades six through eight in a public school in Catalina Foothills School District.

15. There are numerous public high schools in the Tucson area wherein James Zobrest could receive an education in full compliance with the EHA, as well as all state laws relating to education, including the Arizona compulsory school attendance statute, A.R.S. § 15-802. If he chose to attend any of these public high schools, he would be afforded, without cost to his parents, and at the

full expense of Catalina Foothills School District, the services of a sign language interpreter. Catalina Foothills School District would also pay all tuition costs of James Zobrest to attend these public schools.

16. James Zobrest is enrolled at Salpointe for the particular reason that his parents Larry and Sandra Zobrest, desire him to be educated, at the high school level, during his adolescence, in a Roman Catholic educational institution.

17. The parents of James Zobrest desire a Roman Catholic high school education for him due to their sincere religious convictions.

18. There is no doctrine or other rule of the Roman Catholic Church that requires that James Zobrest attend a Catholic high school. The Catholic bishops of the United States, however, in their official pronouncement on education, *TO TEACH AS JESUS DID* (National Conference of Catholic Bishops, 1972), stated: "Christian education is intended to make men's faith become living, conscious, and active, through the light of instruction . . . The Catholic school is the unique setting within which this ideal can be realized in the lives of Catholic children and young people." (Para. 102.) "With the Second Vatican Council we affirm our conviction that the Catholic school retains its immense importance in the circumstances of our times and we recall the duty of Catholic parents to entrust their children to Catholic schools, when and where this is possible, to support such schools to the extent of their ability, and to work along with them for the welfare of their children." (Para. 101).

II. SALPOINTE CATHOLIC HIGH SCHOOL.

19. Salpointe is a private Roman Catholic educational institution for young men and women under the direction of the Carmelite Order of the Roman Catholic Church. Salpointe is pervasively religious in character, and its goal of educating students in a religious atmosphere constitutes an integral part of the religious mission of the Roman Catholic Church.

20. Salpointe gives preference, when considering applications for enrollment, to applicants of the Roman Catholic faith.

21. Salpointe is supported solely by the Roman Catholic Church, the Carmelite Order (a Catholic religious order), gifts and tuition from enrollments. Salpointe receives no state subsidy.

22. The objective of Salpointe is to nurture its students' ability to make moral choices and to instill a sense of Christian values. Salpointe has as its distinguishing purpose the inculcation in its students of the faith and morals of the Roman Catholic Church. Salpointe would not exist but for that goal.

23. Religion is among the required subjects at Salpointe. All students are provided formal instruction in the Roman Catholic faith.

24. Mass is celebrated at Salpointe each school day from 7:55 a.m. until 8:20 a.m. Salpointe strongly encourages Catholic students to attend Mass.

25. Teachers at Salpointe sign a Faculty Employment Agreement which states that "Religious programs

are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other."

26. The Faculty Employment Agreement requires teachers to not only accept, but also to promote, the relationship among the religious, the academic and the extracurricular.

27. The Faculty Employment Agreement states in part the following philosophy for Salpointe's teachers:

"1. Teacher shall at all times present a Christian image to the students by promoting and living the school philosophy stated herein, in the School's Faculty Handbook, the School Catalog and other published statements of this School. In this role the teacher shall support all aspects of the School from its religious programs to its academic and social functions. It is through these areas that a teacher administers to mind, body and spirit of the young men and women who attend Salpointe Catholic High School.

* * *

"3. The School believes that faithful adherence to its philosophical principles by its teachers is essential to the School's mission and purpose. Teachers will therefore be expected to assist in the implementation of the philosophical policies of the School, and to compel proper conduct on the part of the students in the areas of general behavior, language, dress and attitude toward the Christian ideal."

28. Salpointe encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.

29. The Salpointe Faculty/Staff Handbook states that "A lively sense of God's presence and the struggle to experience that presence should permeate the atmosphere of our schools."

30. Salpointe maintains a religious atmosphere within the physical premises of the school through the use of Catholic religious symbols and the observance of Catholic religious customs.

31. The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe.

32. References or statements of a religious nature may or are likely to occur during the course of one or more of the class sessions, in addition to scheduled religion sessions, in which James Zobrest is in attendance at Salpointe.

33. The parties agree that, for the purpose of this case, the religious character of Salpointe is not limited in any material manner.

III. REGISTRY OF INTERPRETERS.

34. The Registry of Interpreters For the Deaf, Inc. ("Registry") is a nationwide body, with headquarters at 51 Monroe Street, Rockville, MD 20850, which evaluates, tests and certifies individuals who desire to become sign

language interpreters for the deaf and hearing-impaired. A candidate who is found professionally qualified by the Registry becomes a Certified Member of the Registry.

35. Certified members of the Registry are required to interpret according to the Registry's Code of Ethics which defines "interpret" to mean: "Spoken English to American Sign Language; American Sign Language to Spoken English." A Registry-certified sign language interpreter is forbidden by the Code of Ethics to edit in any way communications to and from the deaf person who he or she serves as sign language interpreter.

36. There may be occasions when a sign language interpreter is unable, due to limitations created by the interplay of two separate languages, to effect a perfect or literal translation of communications to or from the hearing impaired person. On such occasions, however, the sign language interpreter attempts to convey as accurately as possible all communications to or from the hearing-impaired person.

37. A sign language interpreter hired to interpret for James Zobrest at Salpointe is required by the Registry's Code of Ethics to interpret (as defined in Paragraph 35) for James Zobrest all communications by James Zobrest's teachers in class, including references or statements of a religious nature.

IV. EVENTS IMMEDIATELY PRECEDING LITIGATION.

38. In October, 1987, anticipating their son's enrollment at Salpointe, Larry and Sandra Zobrest requested Catalina Foothills School District to furnish their son,

James Zobrest, the services of a certified sign language interpreter beginning in August, 1988.

39. On January 8, 1988, the Assistant Superintendent of Catalina Foothills School District sought a legal opinion from the Pima County Attorney, asking for a determination for the legal propriety of the School District's provision of such services.

40. On April 26, 1988, a Deputy Pima County Attorney issued an opinion to Catalina Foothills School District, which stated ~~that the~~ furnishing of the requested sign language interpreter services to James Zobrest at Salpointe Catholic High School would be unlawful under the state and federal constitutions.

41. In an opinion dated June 27, 1988, the Arizona Attorney General concurred with the opinion of the Deputy Pima County attorney. The Attorney General's opinion is denominated I88-072. The plaintiffs were informed of Attorney General Opinion I88-072 by a memorandum from the Assistant Superintendent of Catalina Foothills School District on or about July 12, 1988.

42. It is the agreement of the parties that it would have been futile for Plaintiffs to have pursued administrative "due process" procedures available pursuant to the EHA and 34 C.F.R. §§ 300-500 *et seq.* since the Arizona Attorney General had opined that the School District was forbidden, by both the Arizona and Federal constitutions, to provide the services required by James Zobrest while enrolled in a pervasively religious Catholic high school. Linda S. Pavol, Esq., counsel to the Arizona Department of Education, by affidavit December 29, 1988, a copy of

which is appended as Exhibit A, has stated this conclusion.

43. When classes at Salpointe commenced August 17, 1988, Larry and Sandra Zobrest undertook to hire and pay for the services of a certified sign language interpreter for their son.

44. The cost to Larry and Sandra Zobrest for hiring a certified sign language interpreter for their son is approximately Seven Thousand Dollars (\$7,000.00) per year.

45. The parties stipulate that Defendant's Request for Admissions dated November 1, 1988, and Plaintiffs' Response thereto, dated December 15, 1988, are incorporated herein by reference and may be filed with the Court as part of the record in this action. The parties further stipulate that Plaintiffs' Non-Uniform Interrogatories and Requests For Admissions served November 1, 1988, and Defendants' Answers thereto served December 5, 1988, are incorporated herein by reference and may be filed with the Court as part of the record in this action.

DATED this 6th day of April, 1989.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

LARRY ZOBREST,)	NO.
Plaintiff,	)	CIV-88-516-
	)	T-RMB
vs.)	
CATALINA FOOTHILLS	)	July 17, 1989
SCHOOL DISTRICT,	)	2:30 o'clock a.m.
Defendant.	)	Tucson, Arizona
)	

CROSS-MOTIONS FOR SUMMARY JUDGMENT
 Before THE HONORABLE RICHARD M. BILBY
 APPEARANCES:

WILLIAM BENTLEY BALL
 Attorney at Law
 For the Plaintiff

THOMAS BERNING
 Arizona Center for Law
 Attorney at Law
 For the Plaintiff

JOHN C. RICHARDSON
 Attorney at Law
 For the Defendant

Court Reporter: JOHN C. DAVIS
 United States District Court
 P.O. Box 142
 Tucson, Arizona 85702

Proceedings recorded by mechanical stenography, transcript produced from dictation.

[p. 2] PROCEEDINGS

THE CLERK: In Civil 88-516. Larry Zobrest versus Catalina Foothills School District, on for cross-motions for summary judgment.

Counsel please state their appearances for the Court.

MR. BERNING: Tom Berning from the Arizona Center for Law on behalf of the plaintiff.

MR. BALL: William Ball on behalf of the plaintiffs.

MR. RICHARDSON: John Richardson on behalf of the defendant, Catalina Foothills.

THE COURT: Proceed.

MR. RICHARDSON: Your Honor, we have cross-motions for summary judgment, so either one of us could start; do you have a preference?

THE COURT: None whatsoever.

MR. BALL: Your Honor, may it please the Court, first of all, Your Honor, I want to thank you as a Pennsylvania lawyer for your courtesy in permitting me to appear in your court. I want to thank also co-counsel, Thomas Berning, for his great help in this case. And I also have not found greater courtesy than has been shown me by Mr. Richardson.

If Your Honor will indulge me for a moment, I'm sure you have many questions. I would like to begin simply by getting a careful focus on the basic moving facts in this [p. 3] case. They come under three headings. First of all, the deafness of the plaintiff, James Zobrest. Secondly, the

circumstance of his enrollment at Salpointe Catholic School; and, finally, the relief sought.

James Zobrest, as Your Honor knows, is profoundly deaf. He has to have the services of a sign language interpreter in order to be educated. As a deaf person he is within the class of beneficiaries set down in the public policy reflected in Federal Act 94-192 and related Arizona statutes. The sign language interpreter, or the services of such person, are what are known in EHA law as related services. The services among these are interpreter services, transportation services, services which enable a child to get the education that he needs.

The school district agrees that it is under the EHA obligated to furnish these services, but for one fact; namely, they would be rendered, according to the plaintiff's wishes, on the premises of Salpointe Catholic High School where James is enrolled. There is no question here, no issue about cost or administrative means in furnishing the services.

Secondly, as to enrollment, James is enrolled in Salpointe, which is a pervasively religious school; that's a given in the case. He's there because of a command of religious conscience which his parents very strongly have, and that, of itself, allows them no option. They want both the [p. 4] religious formation which would be given at Salpointe, and the general education wherein they fulfill all of the public policy requirements of the compulsory attendance laws of the State of Arizona.

The relief they seek is not money, not funds, it's not subsidy, they simply seek the providing of the services, as

the complaint in their prayer for relief states. And Salpointe is not a party to this action, nor an intervenor, nor has expressed any interest in the case whatsoever.

Now, the school district acknowledges those three sets of facts I have just described, but it says that to give this deaf boy sign language interpreter service, to which he's statutorily entitled, would violate the establishment clause of the Constitution. That, so they say, is because, first of all, it would have a primary effect advancing religion. And, secondly, because it would create excessive church/state entanglement.

And this position on the establishment clause the school district bases on a series of Supreme Court cases which are cited in its brief. Your Honor, not one of the cases is in point, not one is a precedent, not one involves any handicapped person. And that, I think, becomes extremely material, as Your Honor ponders this case, because I think the locus of decisions in this case lies somewhere within the polar assumptions, on the one hand respecting primary effect [p. 5] advancing religion, or primary benefit being to the child. Here I think is where it is on which this case will turn. I think the establishment and the excessive entanglement arguments are marginal, but granted time I'll deal with them, or if granted time I'll deal with them.

We speak then - we raise the question of whether or not the furnishing of services to this boy are going to advance religion, have a primary effect on advancing religion. And here, I think, as I have noted, that no religious body is a party to the case. The high school is not; there are no - there is no transfer of funds taking

place. But also I think we have to see this case against the background of at least three Supreme Court decisions which relate to services to children, namely, of course, the *Everson* busing case of 1947 in which it was held constitutionally not a violation of the establishment clause to bring children directly to the religious school for their religious education; and, again, in *Board of Education versus Allen*, and again in *Meek versus Pittenger*. The holding of the Court was that there could be aid given directly to children.

Now, mainly, I think in background, as we think of cases, there being no precise precedent in the picture, is a case which is very, very close to this, which we have cited also, which is *Witters versus Washington Department of Services for the Blind*. That's a 1986 case. It's the latest [p. 6] expression by the Supreme Court of the United States in this area, and it's a unanimous expression. Here the Court was dealing - I'm reading now from the summary in the Supreme Court Reports - "You have a student attending a Christian college, he's studying to become a pastor, Christian missionary, or a religious youth director, he applies to the state agency for rehabilitation assistance, consisting of payments for his education." The Court held that the aid furnished under Washington's vocational program, rehabilitation program for this blind student to become - to attend a Christian college in order to become a pastor or missionary did not violate the establishment clause.

This case is close to the present case; in each case you have a handicapped person. In that case, in the *Witters* case, you had a cash grant subsidy, and in *Walz versus The Tax Commission*, the Supreme Court noted that it's in the

area of subsidy cash grants that we have the closest proximity to potential establishment clause difficulties. But here the Court allowed state funds to go to this religious institution simply at the will of the recipient.

THE COURT: Did they go to the recipient or to the school?

MR. BALL: It went to the blind person.

THE COURT: It went to the person then?

MR. BALL: It was at his option, known to the [p. 7] Court – in fact, the case originated because he was already enrolled in a religious school, and said that that's where the money was going. So the money at the will of the recipient could be transferred to a public institution or to a religious or other private institution. And the Court did not find this posed any kind of establishment clause difficulty. It's puzzling, therefore, when I saw the brief of our opponents, at page 39, when they speak of the danger of financial aid fortuitously winding up in sectarian hands – that was a cash case, *Witters*. This is not. This is a case simply asking for a service. In *Witters* you had, as here, entitlement already under an act, the entitlement of the Washington rehabilitation statute, and here entitlement under the FDHA.

THE COURT: I guess the only place you can ever become a religious school – or a pastor is a religious school, you can't go to a public school to become a pastor.

MR. BALL: That's right.

THE COURT: So it seems to me that's a little bit of a difference, because here there is available, readily

available, a decent education for youngsters, but at a non-Catholic school.

MR. BALL: Well, it's available only in the sense that – and this applies to the *Witters* case too – where a conscientious choice is made. and here I notice that our opponents in their latest brief somewhat denigrated the [p. 8] religious claim involved here. The facts are very carefully stipulated that the only reason that James Zobrest is enrolled in Salpointe Catholic High School is on account of his parents' religious convictions, and whether the Catholic church mandates that or not is not relevant.

Well, I don't pay any attention to that. It seems to me that the real nub of the whole thing is, it goes back to what we talked about a long time ago in the preliminary injunction, and that is the fact that this signer has to sign everything.

MR. BALL: That's correct.

THE COURT: And that means this person is going to have to sign Catholic theology, which is part and parcel of the religion of the education that the child is going to receive at the high school. I mean, that's one of the reasons, besides the fact that it's one of the best high schools in town and a lot of non-Catholics go there for that reason. But the big thing for that in there, you not only get a good education, but you get a Catholic slant on things, and that's just part of the education.

Now, there is nothing wrong with that, but the signer has to be – without the signer doing it the child cannot receive that religious education.

MR. BALL: He can't receive any of it, the whole educational package – of course, this is the school in which [p. 9] compulsory – in which the curriculum, as required and approved by the state, hence has the whole body of knowledge, history, geography and everything else, and that comes through the same pipeline. But the point is this: As far as – and our opponents seem to have made the distinction, Your Honor, the distinction in the bus case, in the *Everson* case, the Court upheld, over First Amendment objections, the very busing of children to a school where they get the whole package of religious education.

THE COURT: But the busing doesn't convey any religious activity, it just takes you from one spot to another. What is happening here is that there is religious doctrine that is incorporated into the courses, and that is being conveyed word for word by the signer from the teacher, be they lay or church, to the student.

MR. BALL: But, Your Honor, the sine qua non of the busing service, the sine qua non of education for many children attending religious schools is the bus gets them there. And I would say the parallel would be this, Your Honor: If the driver of the bus now began to start from singing hymns or reciting Catechism or starting to read the Bible in the course of that transmission, then you would be having the thing I think you are talking about, the adding by this neutral conduct, and he is a conduit, he is a transmitter, the bus driver, the adding of that, of religious [p. 10] input, whereas, the affidavits very clearly show and the record establishes this interpreter can't do anything of that kind.

But let's suppose that –

THE COURT: Does this interpreter, when they start class with a prayer, does this interpreter sign the prayer?

MR. BALL: Yes, he will. And I think that constitutes no First Amendment offense whatever in terms of support of that interpreter.

We're back to the question, Your Honor, on the merit. We're talking about the primary effect, and it seems to me incredible to say that the fact that this boy receives that service, that service of this registered sign language interpreter, the fact that he receives that as the means of getting an education, which is the conscientious choice of his parents, is not – it creates no primary effect advancing religion. There isn't a case which says that, so we're dealing here, Your Honor, with a new case, a case of first impression. So there isn't any precedent for it. *Witters*, I think, comes quite close; but, in addition, you have to look at the other side of the primary effect.

Primary effect, the primary effect, and it can't be denied, that a tremendous effect of this service to this child is to enable him to learn, to enable him as a beneficiary intended to be so under the Education for the Handicapped Act. [p. 11] He's now told because of one thing, his parents' religious choice, he's now cut off from that. This is what you had in *Sherbert versus Verner*. You had the public funds, an unemployed person, a Seventh Day Adventist, and the State of South Carolina then said: You've been offered a Saturday job, go take it; you are free to take it, you are perfectly free. She said: No, my religious convictions get in the way of that; I can't do it.

It's just a can't, it's a given in that case, as it is here and as it was in *Wisconsin versus Yoder* -

THE COURT: That's not quite right, and I'll tell you why. You know, it's no secret, I have gone to school with all kinds of friends who were Catholic, and many, many of them didn't go to Catholic schools; some did. But if you are a Seventh Day Adventist and you attend the Seventh Day Adventist church, you don't work Saturday any more than if you are an Orthodox Jew you don't do anything from sundown Friday until Saturday or Sunday.

MR. BALL: Your Honor, you are making a religious judgment now in this case.

THE COURT: I'm not making a judgment, I'm making an observation about what people have done.

MR. BALL: Well, Your Honor, what you are saying, I think, Your Honor, is that because the Seventh Day Adventist religion commands you not to work on Saturday, therefore, her situation in *Sherbert* is different from this. In each case, [p. 12] it's not what each church says, it's the religious conscience, what the religious conscience of the individual says; and courts may not say -

THE COURT: But you have told me that this is not religious - not the religious conscience of the child, it's the parents'.

MR. BALL: Well, the parents are plaintiffs in this case, and the child is enrolled there because of their religious conscience. So we have plaintiffs in each case, in *Sherbert* and in this case, and in *Wisconsin versus Yoder*. In each case we have individuals who are before the Court

and who are saying: We have to do a certain thing, or we must abstain from doing a certain thing because not of what the church says, but because of what I believe as a religious person. That's what you have here.

Now, in the *Wisconsin* case and in *Sherbert versus Verner*, and in each of those cases the state said something like what Your Honor has said: Look, you really don't have to - you really can't work on Saturday, or you really - and the *Wisconsin* case - you really can send your kids to a couple of years of public school. Why not? And the court in each case said - the claimant says: I cannot. I cannot; here I stand, I can do no other. In each case the court said - the courts are not going to say: Oh, that's not really a conviction, or you really can work on Saturday. No, [p. 13] if you had that fact here, that is why when we began this case, in our complaint we were speaking of this as a free exercise case. That's because you have here precisely the question, and it's beautifully framed by the court in *Thomas versus The Review Board*, and it says where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious beliefs, thereby putting substantial pressure inherent to modify his behavior to violate those conditions, a burden on religion exists.

This is what you have here. Jimmy Zobrest - forget getting the services to which public policies say you are entitled, do so because you shouldn't have to obey, your parents shouldn't obey their religion. This is what we have involved here. I think that when we are talking about primary effect we come back to *Witters* again. And we ask: What did the Supreme Court ask in that case? Is

any significant portion of this aid going to a religious institution? They said in *Witters*, since it wasn't it didn't pose any serious problem of advancing of religion, though the State of Washington insisted it did.

It's not well suited also as a vehicle for subsidy, the court said in that case. This isn't well suited as a vehicle for subsidy because there is none. We're simply [p. 14] seeking a service to a deaf boy upon which his future depends. In *Witters* they said: This isn't the kind of program that is going to create incentives for sectarian education for millions of people to say: Hey, let's go to this program. Nothing of the kind is involved here. And whatever aid to Salpointe comes out of this clearly falls in the margin.

THE COURT: You've only got about two more minutes.

MR. BALL: Really, Your Honor? I thought I had a half hour.

THE COURT: You do, but you had a half hour for everybody, and if you take the whole half hour then he doesn't get anything.

MR. BALL: Oh, Your Honor, I thought it was a half hour per side. I'm sorry. That is not true?

THE COURT: No, I've got another hearing at 3 o'clock which I can push off a little bit, but I'll give you some more. Just go ahead and finish up.

MR. BALL: Well, I leave then to our brief the whole question about a symbolic union between church and state. The *Grand Rapids* case is simply way wide of the mark. There was a program involving public school

teachers on the premises of forty religious schools with a wide range of courses and then the policing of public and parochial classrooms and alike, and nothing of the kind is involved here.

Now, on excessive entanglements, and I'll wind up [p. 15] with this, Your Honor, our opponents rely principally on the *Aguilar v. Felton*. I begin here in discussing *Aguilar*. I would begin by referring to the very significant statement of the U.S. Secretary of Education, which we have cited, in 1985, right after the *Felton* decision, and he said this: "The Supreme Court has recognized that the implications of one decision within the establishment clause for other cases presenting different facts and circumstances are not always clear. It would therefore be presumptuous for education authorities to extend the *Felton* decision beyond the circumstances clearly addressed by that case. The *Felton* decision need not have the effect of prohibiting on-premises services to private school children in all other federal programs with respect to programs within the Bilingual Education Act and the Education of the Handicapped Act, for example, a prohibition of on-premises services may make it impossible to provide the services required by those statutes." That, I think, is a very good statement relating to the constitutional law as facts and circumstances different.

Thank you, Your Honor.

THE COURT: Okay. Thank you, Mr. Ball.

Mr. Richardson?

MR. RICHARDSON: Your Honor, I just have two or three minutes of comments unless the Court has additional questions.

[p. 16] I think the cross-motions are briefed thoroughly and are before the Court for decision.

On the comments that have been made, I'd just like to point to a couple of things. *Witters*, I believe, is distinguishable. It was a grant of money directly to a recipient in a very general sense. Where that recipient chose to use it was one thing, and very different than placing a publicly paid employee in a classroom on a constant basis with the attendant entanglement that that incurs. In fact, in *Witters* there was no discussion of the entanglement issue, because when the Supreme Court decided to reverse, they remanded it to the court below and said: You have to talk about the entanglement issue here; it hasn't been before the court.

In addition, when they spend a great deal of time talking about the busing situation in *Everson*, I suggest to the Court that all it need do is look to the busing section in *Walter v. Lohman*, that decision. One of the last sections, Section 8 of that opinion, is where they talk about the request by the statute, the state scheme of allowing busing to occur for private school children to the same places the public school children get together. And the court threw it out and said: That's unconstitutional. I think in the language in there, it clearly indicates the division between the type of program that we have here and the busing that was [p. 17] evident in *Everson*, and I think the language there is very clear in that regard.

Third, there is a lot of times in the discussion where the point is made, or the argument is made that we are dealing with one student and therefore it's only incidental. And that's not the incidental benefit analysis that is used by the court. The court says that a benefit is incidental only if the aid is unrelated to the religious-oriented educational function. So, whether it's one student or a thousand students, whether it's one Bible or five hundred Bibles, that is not what the Court is looking at. Transportation is a lot less related than having a public paid employee standing in a classroom repeating Catholic dogma to the student in the classroom.

We are very sensitive to James Zobrest's educational needs, but we have to stay sensitive to the greater interests of the First Amendment in this case.

Last but not least, in their argument they spend a great deal of time talking about therapeutic versus diagnostic services, and the only reason why those public employees were upheld is that there was little direct contact with the students, little or no educational contact, and not closely associated with the educational mission. None of those limitations will exist in this case with an interpreter in a sectarian setting day after day after day.

[p. 18] So unless the Court has anything further, I think the positions are well briefed and we would ask the Court to render a decision accordingly.

THE COURT: Thank you. They are well briefed, Mr. Richardson.

Anyway, I'll surely think about it some and I'll try to get a decision as soon as I can.

Thank you very much, Mr. Ball.

You may be excused.

* * *

[p. 19] CERTIFICATE

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Official Court Reporter

Date

No. 92-94

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband
and wife; JAMES ZOBREST, a minor, by LARRY
and SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Petitioner, James Zobrest, a boy profoundly deaf from birth, complied with the compulsory education laws of Arizona by attendance at the religious school of his parents' conscientious choice. Since James required the services of a certified sign language interpreter in order to receive education, petitioner parents applied to respondent public school district for the providing of such services under the terms of the Education of the Handicapped Act (EHA)*, an act for aid to the education of all children with disabilities. Respondent found James fully qualified under those terms to receive such services but declined, solely on Establishment Clause grounds, to furnish them on the premises of his school. The following question is presented:

Does the Establishment Clause bar a local educational agency from providing, under the EHA, the service of a certified sign language interpreter to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

* 20 U.S.C. §1400, *et seq.* (and its state counterpart, Ariz. Rev. Stats. §§15-761, *et seq.*). The title of the federal act was changed in 1991 to Individuals With Disabilities Education Act ("IDEA") and, throughout the text, the terms "disabled," or "with disabilities," substituted for "handicapped." Since all documents in the record use the former "EHA" terminology, petitioners have retained that in this brief.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which appears as Appendix A in the petition for certiorari, is reported in 963 F.2d 1190 (9th Cir. 1992). The dissenting opinion in that court, which appears as Appendix B in the petition for certiorari is reported in 963 F.2d at 1197 (9th Cir. 1992). The order and judgment of the United States District Court for the District of Arizona, which appears as Appendix C in the petition for certiorari is reported in 441 EHLR 564 (D. Ariz. 1989) and is otherwise unreported.

JURISDICTION

This case was decided and judgment was entered by the United States Court of Appeals for the Ninth Circuit on May 1, 1992. The petition for a writ of certiorari was filed on July 10, 1992, and was granted on October 5, 1992. The jurisdiction of this court was invoked under Title 28 of the United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion . . ."

Education of the Handicapped Act:

20 United States Code, §§1400, 1401, 1412, 1413, 1414(a), 1415, reprinted at A-37 - A-65.* (No changes relevant to this case appear in the Individuals With Disabilities Education Act amending EHA.)

Code of Federal Regulations:

34 C.F.R. §§76.532(a)(1), 76-651, 76-652 to 76-660; 300.1 to 300.14, 300.110 to 300.132, 300.304, 300.340 to 300.348, 300.401 to 300.403, 300.450 to 300.452, reprinted at A-67 - A-105.

Special Education For Exceptional Children Act:

Arizona Revised Statutes, Art. 4, §§15-756, 15-761, 15-764 to 15-769, reprinted at A-105 A-127.

STATEMENT OF THE CASE

Statement of Facts

In October, 1987 petitioners Larry and Sandra Zobrest requested respondent public school district (hereinafter "School District") to provide the service of a certified sign language interpreter for their son, the petitioner James Zobrest, a profoundly deaf boy then 14 years old. Petitioners' application was made pursuant to the provisions of the Education of the Handicapped Act (EHA), 20 U.S.C. §1400, *et seq.*, and its Arizona statutory counterpart, Ariz. Rev. Stats. §§15-761, *et seq.* The parents notified

* The signal "A" refers to the Appendix to the Petition For Certiorari. The signal "J.A." refers to the Joint Appendix.

the School District that they had enrolled James at Salpointe Catholic High School for the school year commencing August 17, 1988 (J.A. 93-94), and that he would need the EHA service to be furnished on the premises of that school.¹ The School District found James to be a "handicapped person" within the meaning of the EHA. (J.A. 88). It was agreed by the School District that sign language interpretation is one of the "special education and related services" to which James was entitled. (A-5, n. 1, J.A. 88-89). The School District then pursued EHA procedures for evaluating James' needs and issued an Individualized Education Program (IEP) for him on September 21, 1988. The IEP specified: "All parties agree that Jim Zobrest needs the services of a sign language interpreter." (A-128 - A-134, J.A. 88).

James' enrollment at Salpointe Catholic High School was based upon the mandate of the religious conscience of his parents, in keeping with the views of their church. They felt it essential that, at the time of adolescence, James be enrolled in a religious school. (Zobrest affidavit, J.A. 63-64). Salpointe is a pervasively religious school (J.A. 90-92), in which daily worship is held and encouraged and religious values are emphasized. (A-5). At Salpointe James fulfilled the requirements of the Arizona compulsory school attendance law. (J.A. 87). Salpointe is

¹ At the junior high school level the respondent school district had furnished him, on public school premises, a mainstream program with resource room assistance for academics, speech/language therapy, and an interpreter for all classes. (A-128).

approved by the Department of Education, State of Arizona, and is accredited as a College Preparatory School by North Central Association of Colleges and Schools. The basic curriculum for graduation consists of English, Social Science, Mathematics, Science, Foreign Language, Religion and five to nine hours per year of electives. (J.A. 81-85). Salpointe's graduates have long been accepted in scores of nonsectarian colleges and universities throughout the nation.²

A certified sign language interpreter is an individual certified by the Registry of Interpreters For the Deaf and, as such, is bound by the Registry's Code of Ethics.³ The Code defines "interpret" as:

Spoken English to American Sign Language (ASL); American Sign Language to Spoken English.

(J.A. 70). The Code states further:

Interpreter(s) . . . are not editors and must transmit everything that is said in exactly the same way it was intended . . . Interpreter(s) . . . must remember that they are not at all responsible for what is said, only for conveying it accurately. If the interpreter's . . . own feelings interfere with rendering the message accurately, he/she shall withdraw from the situation.

² Salpointe Catholic High School Annual Report, 1986-1987, 22-23, Exhibit C to Defendant's Second Request For Admissions and Non-uniform Interrogatories, admitted into evidence by order of the District Court filed April 13, 1989.

³ A copy of the relevant portion of the Code is attached to the affidavit of interpreter James Santeford. (J.A. 77-80).

(J.A. 73).

Just as interpreter(s) . . . may not omit anything which is said, they may not add anything to the situation, even when they are asked to do so by other parties involved . . . The interpreter's only function is to facilitate communication. He/she shall not become personally involved because in so doing he/she accepts some responsibility for the outcome, which does not rightly belong to the interpreter . . .

(J.A. 74).

Thus in performing his or her function, the sign language interpreter is the conveyor of communications to and from the deaf student, so that the latter's educational experience is sought to be identical to that of the hearing student.

James' parents, by affidavit, stated that the cost to them (in addition to \$2,000. annual tuition and expenses) of hiring a certified sign language interpreter would be somewhat over seven thousand (\$7,000.) dollars per year. (J.A. 65). The School District stipulated that, had his parents forsaken their choice of a religious school for James, he "would be afforded, without cost to his parents, and at the full expense of Catalina Foothills School District, the services of a sign language interpreter." (J.A. 88-89).

On June 27, 1988, the Arizona Attorney General issued an opinion that the Establishment Clause barred the furnishing, on the premises of Salpointe, sign language interpreter services for James (J.A. 9) and the

School District accordingly declined to do so.⁴ On May 16, 1992, James was graduated from Salpointe.

The Course of Proceedings

On August 1, 1988, petitioners brought this action in the United States District Court for the District of Arizona, alleging economic hardship (J.A. 21, 66-67) and claiming that respondent's denial of the requested services of a certified sign language interpreter violated the EHA and petitioners' free exercise rights. The complaint, pursuant to 20 U.S.C. §1415(e), 28 U.S.C. §2202, and Rule 65 of the Federal Rules of Civil Procedure, sought an injunction requiring the providing of the services and, alternatively, "such other and further relief as the Court may deem just and proper." (J.A. 25).

Before the District Court it was the position of the School District that it was empowered by EHA to furnish the sign language interpreter service to James on the premises of any public school or of any secular private, "non-parochial" school. (J.A. 34, 35, 37).⁵

The District Court on July 18, 1989, granted respondent's cross-motion for summary judgment and, relying upon *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School*

⁴ The respondent continued James in its special education system, providing, pursuant to the EHA, speech therapy services twice weekly to him on public school premises, transportation related thereto, and continuing annually to update his IEP. (J.A. 88, A-128 - A-131).

⁵ The School District has continued to maintain this position throughout this litigation. A-5; Brief In Opposition To Petition For Writ of Certiorari, 3.

District of Grand Rapids v. Ball, 473 U.S. 373 (1985), held that the furnishing of the requested services to James would violate the Establishment Clause by creating "entanglement of church and state that is not allowed." *Zobrest v. Catalina Foothills School District*, 441 EHLR 564 (1989).⁶

On August 4, 1989, respondents filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit, challenging the District Court's ruling under the Establishment Clause and asserting free exercise and equal protection grounds for reversal. On May 1, 1992, a divided Court of Appeals, affirming the judgment of the District Court, held that to provide the requested EHA service on the premises of James' religious school would have a primary effect advancing religion by creating a "symbolic union" of church and state (A-10) and by constituting public aid to a sectarian institution. (A-11 - A-12). Further, it would create excessive entanglements between government and religion. (A-13). On July 10, 1992, petitioners filed a Petition For Certiorari in the Supreme Court, and that petition was granted October 5, 1992.⁷

⁶ The Attorney General had stated that it would be futile for petitioners to exhaust administrative remedies under EHA (A-135), and the parties thereafter so stipulated. (J.A. 94).

⁷ Petitioners, both under the prayer of their complaint for relief alternative to injunction and by virtue of 20 U.S.C. §1415(e)(2), are now seeking reimbursement of the expense they have incurred in paying for the services of a certified sign language interpreter for James for the school years August, 1988, through May, 1992, when he was graduated.

SUMMARY OF ARGUMENT

The Court of Appeals, holding that the petitioner James Zobrest was eligible, under the EHA, to receive the service of a certified sign language interpreter, erred in holding that the furnishing of that service on the premises of James' religious school would have a primary effect advancing religion. The requested interpreter's service would have multiple effects, the primary effect being the advancing of the general education of a citizen. The furnishing of that service on the premises of James' school would create no symbolic union of church and state and would suggest no governmental sponsorship of religion. Prior decisions of the Supreme Court in the *Mueller*, *Witters* and *Allen* cases sustain the constitutionality of affording the EHA service sought by petitioners, while decisions of this Court in the *Lemon*, *Meek*, *Wolman*, *Grand Rapids* and *Aguilar* cases are not precedents to the contrary. No excessive entanglements between government and religion would arise from the providing of the required EHA service. The primary effect of denial of the service is the inhibiting of religion.

ARGUMENT

THE ESTABLISHMENT CLAUSE DOES NOT BAR A LOCAL EDUCATIONAL AGENCY FROM PROVIDING, UNDER THE EHA, THE SERVICE OF A CERTIFIED SIGN LANGUAGE INTERPRETER TO A DEAF CHILD ON THE PREMISES OF THE CHILD'S RELIGIOUS SCHOOL

The Court of Appeals agreed with all parties that James Zobrest was statutorily qualified to receive the

EHA service which he and his parents had requested. (A-4 - A-5, J.A. 88-89). The court, however, held that the furnishing of that service would have a primary effect advancing religion and hence constitute a violation of the Establishment Clause. (A-9 - A-10). This "primary effect," the court said, would arise from the School District's placing of the interpreter on Salpointe's premises to be at James' side in all of his school functions since that would (a) create a "symbolic union" of church and state (A-10), (b) constitute public aid to a sectarian institution (A-11 - A-12), and create excessive government-religion entanglements. (A-13).

A. The Primary Effect of Providing the Service Would be to Advance the General Education of a Citizen

The determination of the Court of Appeals that furnishing sign language interpreter service to James would have a primary effect advancing religion rests upon a misconception of the term "primary." Particular governmental actions may have multiple effects. The court's view appears to be that if the provision of a service has *any* religious effect, then the primary effect of the service is religious. But if the word "primary" is to have any meaning, one out of many effects of particular governmental action may not automatically be held "primary" simply because it is religious. The present case serves to illustrate that point.

At Salpointe, James, through the interpreter, received religious education and engaged in religious practice. He also received an education largely indistinguishable, from

a secular viewpoint, from that of any other Arizona boy meeting state compulsory attendance requirements in a school approved by the Arizona Department of Education and accredited by the North Central Association of Colleges and Schools. (See J.A. 87, 81-85). The fact that Salpointe is a pervasively religious institution does not alter the fact that, through the interpreter at Salpointe, James worked the same equations in algebra, the same theorems in geometry and the same conjugations in German that all students in secular schools work.

The School District stresses, however, that James' parents chose Salpointe because they wanted him educated at a Catholic school. This is indeed true. (J.A. 89). That was their personal *religious* reason. But that is no more relevant to the question of whether the religious effect of his education at Salpointe was the primary effect of the interpreter's service than was his parents' *educational* reason. They, like all responsible parents, desired to secure for their child a foundation in the common branches of learning in order that James might become independent, survive in the world, qualify for the business of life, obtain employment to sustain himself, and, conceivably, go on to college. The service of the interpreter for James at Salpointe produced *multiple* effects, most of these being identical to the secular effects produced in public schools and undeniably constituting, quantitatively, the predominant educational effect. The Zobrest parents did not send their son to Salpointe to become a religious zombie. Especially because he is severely handicapped, they wanted him to get what the state regards as proper education (J.A. 87 and see A.R.S. §15-802) and, in accordance with an important objective

of EHA (§1412(5)), to get it in a common environment with non-handicapped children. The primary effect of the interpreter service was *the advancing of a disabled boy's education as a citizen in a way consonant with the civil right of freedom of conscience.*

B. No "Symbolic Union" of Government and Religion Would be Created by Furnishing the Requested Service

Both the Court of Appeals and the respondent School District rely on *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), for their conclusion that the District's providing a sign language interpreter to James would create a "symbolic union" between church and state. (A-9; Br. Opp.* 7-8.) This conclusion is plainly erroneous. The facts of *Grand Rapids* and the facts of the present case do not remotely match up. *Grand Rapids* involved two educational programs taught by public school teachers, financed by public school districts, and carried out on the premises of religious schools. One of the programs covered instruction in a range of courses (reading, art, music, etc.) supplementary to the core curriculum. The other offered a group of courses (Arts and Crafts, Home Economics, etc.) for both children and adults. The public school system leased the classroom space from the religious schools, and signs were posted giving notice to the public that the spaces were so leased. This Court held the programs to create a "symbolic union of government and

* "Br. Opp." refers to Brief in Opposition to Petition For Writ of Certiorari.

religion in one sectarian enterprise" (*Grand Rapids, supra*, at 392), and thus to violate the Establishment Clause. Since *symbolism* (or image) was a matter of decisive consideration to the Court of Appeals in the present case, it is obvious that the *Grand Rapids* programs, with their large scale, their leases and the signs relating to them, the breadth of their educational project taking place in 40 sectarian schools, and the continual movement of students in the programs between religious school and public school classes, necessarily engendered a symbol radically different from any symbol which might be said to be generated by a certified sign language interpreter's assisting James at Salpointe.

While the "symbolism" spoken of by the Court in *Grand Rapids* was one "likely to influence children of tender years" (*id.* at 390), the court below moved from fact to fiction when it ventured that, by providing the interpreter, "the government would create the appearance that it was a 'joint sponsor' of the school's activities." (A-10). That is to say, James' schoolmates, seeing the District-hired interpreter signing to James and speaking for James, would conclude not only (a) that Salpointe Catholic High School and the Catalina Foothills School District were jointly sponsoring Salpointe's myriad activities (a somewhat remarkable conclusion to ascribe to the mind of the typical teenager), but also (b) that behind the "joint sponsorship" was a matter of dark significance: violation of the Establishment Clause of the First Amendment to the Constitution of the United States. The role of a certified sign language interpreter, furnished under EHA, is devoid of any symbolic character, certainly any constituting a "crucial symbolic link between government

and religion." (*Grand Rapids*, at 385). To the contrary, affording James the service requested, if it presented any image at all to his classmates, might well have been one, highly positive in character, of our American government and democratic ways, in acting with fairness and compassion toward the disabled.

The court and the School District wholly misconceive the function of a certified sign language interpreter. Under the Registry's Code of Ethics to which he is bound he can have no role as teacher, editor or initiator, endorser or critic of ideas. (J.A. 70-74).⁸ The certified interpreter's presence in the classroom, unlike that of the teacher, provides no occasion for "the students' emulation of teachers as role models." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 251 (1990), quoting from *Edwards v. Aguillard*, 482 U.S. 578 (1987). Nor would the School District's providing the interpreter be "symbolic" in the sense that it would send any message of government endorsement or of making

⁸ Like the Title I instructors in *Aguilar v. Felton*, 473 U.S. 402 (1985), the certified sign language interpreter is a professional whose mental capacity to follow ethical rules by which he or she is bound should be assumed and whose honor should not, without more, be questioned. The "common sense" of the matter is that such dedicated professionals will not tend to disobey their ethical instructions merely because they serve in a religious school classroom. (*Aguilar supra*, at 425-427, O'Connor, J., dissenting). And see *Sedalia School District v. Missouri Commission on Human Rights*, Case No. 45447, Mo. Ct. App., W. Dist. (1992) (slip op): a public school district justified in firing a high school sign language interpreter who, in violation of the Code of Ethics, either modified language she found objectionable or informed students that the speaker had used "bad language."

religion relevant to any person's standing in the political community. See *Lynch v. Donnelly*, 465 U.S. 668, 687-688 (1984) (O'Connor, J., concurring); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989). The "symbol" of church-state union posed by the Court of Appeals is illusory, and this Court, distinguishing between "real threat and mere shadow" (see Goldberg, J., concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203, 208), should hold it of no constitutional significance.

The School District departs even farther from the teachings of this Court when it looks to *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992) for support. (Br. Opp. 8). The School District says, first, that if it is unconstitutional for government to inject a religious presence into a public school ceremony, then it is unconstitutional for government to inject a sign language interpreter into a religious school classroom. (Br. Opp. 8). The two thoughts simply do not connect. The School District also says that, since public school officials are barred by *Weisman* from sponsoring graduation prayers, they must likewise be barred from placing an interpreter in a religious school where he assists in the communicating of prayers. (*Ibid.*) *Weisman*, however, held only that state sponsorship of prayer by a clergyman at a public school ceremony violates the Establishment Clause because of the subtle coercive pressure for religious conformity which that would exert upon students. *Weisman*, *supra*, at 2656. *Weisman* thus presents a situation to which the facts of the present case are in no way analogous. In the present case a public institution is not involved, no state-directed, clergy-led prayer activity is involved, and the interpreter's role can

in no sense be said to be one which would pressure any student to conform to anybody's religion.

C. Decisions of this Court on "Primary Effect" Contradict, Rather than Sustain, the Opinion of the Court of Appeals

The Court of Appeals (A-11 - A-13), as additional bases for its holding the aid to James to have a primary effect advancing religion, groups two sets of Supreme Court decisions:

1. *Mueller and Witters*. The opinion below correctly summarizes the substance of *Mueller v. Allen*, 463 U.S. 388 (1983), when it notes that involved there was " 'the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from [a] neutrally available . . . benefit . . . ' " (A-11).⁹ The aid to James has no more "primary effect advancing religion" than had the aid to religious school parents in *Mueller*. In *Mueller* the parents' "private choice" consisted in electing to take a state-offered benefit. That is precisely the case with the Zobrests here. It was their election, through their application for help under EHA, which would have triggered the

⁹ The record suggests no benefit whatever which would accrue to Salpointe Catholic High School by an interpreter's providing an EHA service to James. It may be noted that Salpointe is not a party in this case and did not seek intervention. Nothing in the record indicates that Salpointe had previously provided sign language interpreter services to students (which financial burden to the school would be lifted by provision to them under EHA).

District's providing the "neutrally available" interpreter. The providing of the service would have been triggered neither by Salpointe (*Salpointe* made no such application) nor by the School District (which was bound by law to provide such a service.) Further, with the EHA here as with the tax deduction in *Mueller*, "the provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). As Judge Tang well observed in his dissent below (A-20), " . . . [T]he use of the word 'primary' in the [*Lemon*] test connotes a survey of the legislation's total operation, rather than its particular application in the pending case."

In seeking to distinguish the present case from *Witters v. Washington Dept. of Services for the Blind*, 471 U.S. 481 (1986), the Court of Appeals repeats its erroneous assumption that, while in *Witters* the aid resulted from an individual's decision, here it would result from a decision by the State. (A-11). In *Witters* the Supreme Court noted that governmental aid flowed to a religious institution because the blind beneficiary of that aid had chosen to receive it to support his attendance at such an institution. So it is with the deaf individual in the present case. And, as in *Witters*, so here: the EHA service to James "creates no financial incentive for students to undertake sectarian education" (*Witters*, at 488), and "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education" (*Ibid.*) Nor is the EHA program well suited to serve as a "vehicle for subsidy" to religious institutions any more than was the program considered in *Witters*. It should be noted, finally,

that if (as the School District and the court below contend), the religious character of the student's educational institution is determinative of the "primary effect" issue, the institution attended by the student in *Witters* was arguably far more religious. Unlike *Salpointe*, a religious school affording a general educational program, the Inland Empire School of the Bible, wherein the *Witters* student was "studying bible, ethics, speech, and church administration in order to equip himself for a career as a pastor, missionary, or youth director," was akin to a seminary. (*Id.* at 483).

2. *Allen, Meek and Wolman*. The Court of Appeals, as its final ground for holding that furnishing the EHA service to James would have a primary effect advancing religion, relies on *Board of Education v. Allen*, 392 U.S. 236 (1968), *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1979). These, the court says, stand for the proposition that aid to sectarian schools is permissible where it has a " 'purely secular content' " but not otherwise. (A-13).

The court's reasoning does not withstand close examination. In the present case the student aid is secular in nature. The certified interpreter is not a teacher and is precluded by his professional code from originating information. He would be employed by the School District (either as a regular School District employee or as an independent contractor), not by *Salpointe*. His function is mechanical,¹⁰ and the messages he communicates, while

¹⁰ Judge Tang, dissenting below, correctly observed: "I do not understand the majority to say that the First Amendment

partly religious, are by and large the same messages that he would communicate in any secular school. But if, as the court below contends, aid to children which takes place in a religious school setting is invalid because of that fact, then the textbook loan program in *Allen* was invalid. There the books were utilized in religious school classrooms, were permitted to be stored on the premises of those schools (*Allen, supra*, at 244, n. 6.), and advanced the education there taking place. The Supreme Court pointed out that "books . . . are critical to the teaching process, and in a sectarian school that process is used to teach religion." *Allen, supra*, at 245. The Court in *Allen* did not find that a disqualifying factor. Instead it focused on the public purpose the program served – help to the education of children. *Id.* at 247-248.

Meek, also cited by the court below, is inapplicable to the present case. There the Supreme Court considered a Pennsylvania program which called for the loan of "secular, neutral, nonideological" instructional materials and equipment directly to nonpublic (including religious) schools for use in their classrooms. (*Meek, supra*, at 362-363). While this program seemed "constitutionally indistinguishable" from the program upheld in *Allen* (see *Meek* at 388, opinion of Rehnquist, J., dissenting respecting the loan program), the Court held it invalid. This holding was not, as asserted by respondent (Br. Opp. 10),

would be offended by the state's provision of a hearing aid or eyeglasses to a parochial school student. Yet these products, like an interpreter, make it possible for a physically impaired student to receive and decipher religious messages." (A-26).

on the ground that the instructional materials and equipment "could be put to religious use."¹¹ The single ground was the size of the program of institutional loans. Affirming its prior decisions holding "incidental benefits" to religious schools to be constitutional (*id.* at 364), the Court said that the Pennsylvania loan program had a primary effect advancing religion because the aid it constituted was "massive" (beginning for example, with a cost of \$12 million for 1972-1973 and increasing to \$17,560,000. for 1973-1974). *Id.* at 365. This Court characterized the magnitude of the aid program in *Meek* as "providing a direct and substantial advancement of the sectarian enterprise." *Wolman, supra*, at 250.

The present case, then, is readily distinguishable from the foregoing program considered in *Meek*. No property, under the EHA program if here applied, would pass into the possession of a religious institution. The providing of the service of the interpreter to James would scarcely be comparable to the massive aid program held unconstitutional in *Meek*. While this Court considered that program to amount to state subsidy of a parochial school system "as a whole" (see *Wolman, supra*, at 250), the aid sought by petitioners has been assistance targeted to a disabled individual. Even if it were to be argued that the aid to James would constitute a precedent for aid to other deaf children or even to other disabled individuals

¹¹ The Court carefully stated: "To be sure, the material and equipment that are the subject of the loan – maps, charts, and laboratory equipment, for example – are 'self-police[ing]', in that starting as secular, nonideological and neutral, they will not change in use." *Meek, supra*, at 365.

similarly situated, the constitutional nature of the aid – help to an individual as contrasted with direct support of a religious enterprise would be the same.

Wolman, supra, also relied upon by the Court of Appeals, likewise constitutes no authority for invalidating the services which were sought by petitioners. The Court, in *Wolman*, held that speech and hearing diagnostic services could constitutionally be provided children by public employees on religious school premises. The Court carefully distinguished such services from the services of teaching or counseling. The Court noted that diagnostic services have little educational content, are not closely associated with the mission of the religious school, and do not provide opportunity for the transmission of sectarian views. *Wolman*, at 244. The Court based its distinction on “the nature of the relationship” which is found in, on the one hand, teaching and counseling, and, on the other, a service which does not involve the influence, or role model, of one who teaches and counsels a child. *Id.* at 244. The certified sign language interpreter, selected and employed by the public authority to perform a mechanical function, severely bound by his professional Code of Ethics, and functioning *between* a teacher and a student, is in no wise comparable to a religious school teacher.¹²

¹² The Fourth Circuit’s decision in *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 188 (1991), cited by the court below, turned on a construction of Virginia statutes implementing EHA, a placement provision of EHA, and on the court’s reliance on the Virginia Constitution and the Establishment Clause. The Virginia law and the EHA placement provisions

D. Furnishing the Requested Service Would not Create Excessive Entanglements Between Government and Religion, Or Any Entanglements Whatever

While the District Court held that furnishing the interpreter to James would create an “entanglement of church and State [that] is not allowed” (citing, with no discussion, *Aguilar*, *Grand Rapids*, and *Meek*) (A-35), the Court of Appeals found it not “necessary to discuss the third part of the *Lemon* test.” (A-13, n. 5). It went on, however, to say, first, that, if the School District were to furnish James a sign language interpreter, it “would be required to monitor closely the interpreter’s activities to ensure that assistance was not provided at prohibited times.” *Ibid.* Secondly, the court said that since “religious instruction at Salpointe is not limited to specific classes, but pervades the entire curriculum, this monitoring would be the kind of ‘comprehensive, discriminating and continuing surveillance’ . . . the Establishment Clause condemns.” Thus it would be essential “to ensure that ‘teachers play a strictly nonideological role’.” *Ibid.*

The court left its first point in an ambiguous state since it did not explain what it meant by “prohibited

upon which the court ruled are not relevant here. For the reasons petitioners have set forth above, the Fourth Circuit erred in its Establishment Clause analysis. The further reliance of that court on 34 C.F.R. § 76.532, barring use of federal educational funds to pay for religious worship, instruction or proselytization, was not cited by the court below. The court was correct in its avoidance of that ground (see *Petition for Certiorari*, 8, n. 8) as also had been the respondent School District, which raised it for the first time only in its Brief In Opposition. (Br. Opp. 13).

times." As a public employee, the interpreter might reasonably be forbidden to serve in overtime hours. But so could a public school employee. Assuring that would certainly not involve religious monitoring. Thus no "excessive entanglement," as the Supreme Court has defined that term, would be involved here.

As to the court's second point, while the court was incorrect in speaking of the interpreter as a "teacher," the court was correct in saying that religion pervades the Salpointe curriculum. That the interpreter conveys religious messages is a given in the case. Hence warnings derived from *Lemon*, over "prophylactic contacts" needed to keep teachers from inculcating beliefs (see *Lemon, supra*, at 619) are inapposite. Just as no teacher is involved here, nor any inculcation of beliefs by him or her, so too there is nothing here to monitor. Other incidents of the relationship between the School District and the interpreter, such as salary and job performance issues, are essentially those encountered in the usual relationship between public employers and public employees and do not involve any entanglement.

E. Denial of the Requested Service Would Have a Primary Effect Inhibiting Religion

The respondent School District, having determined James to qualify, under EHA, as a handicapped person requiring the service of a certified sign language interpreter in order to receive education, has taken the position that James was entitled to receive the service on the premises of any public school or any secular private school. (J.A. 34, 35, 37; A-4 - A-5). The School District

disqualified him for reception of the service solely on the ground that by furnishing him the service on his religious school premises the School District would have violated the Establishment Clause. The Court of Appeals took precisely that position. Under the teaching of *School District of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) (carried forward in *Lemon, supra*), governmental action, to withstand the strictures of the Establishment Clause must have "a primary effect that neither advances nor inhibits religion." The School District's denial of the requested interpreter service to James (which service, as seen, would have had no primary effect advancing religion) explicitly conditioned his receiving the EHA benefit solely upon the forsaking of his being educated in the religious school of his parents' conscientious choice. The only visible effect of the School District's denial of that benefit was the creating of a plain and powerful inducement to them to do so. It is correct, therefore, to conclude that the primary effect of the School District's action, however proper the School District deemed it to be, was to inhibit petitioners' religion.

Petitioners recognize that the Court has not taken occasion to state whether, by the "primary effect inhibiting religion" test, it has intended simply to paraphrase the Free Exercise Clause. If not, then by analogy to the Court's holdings on "primary effect advancing religion," the finding of a primary inhibiting effect would of itself invalidate the challenged governmental action. Under either reading, the School District's action in denying James the requested EHA service, would be found to violate the Establishment Clause. If the test of inhibition is deemed a Free Exercise test, or a test related to

"hybrid" rights – religion plus parental rights or religion plus disability rights (see *Employment Division v. Smith*, 494 U.S. 872, 881-882 (1990)) – the injury caused to petitioners by denying James the requested EHA aid could not be found justified by a compelling state interest.¹³

The logical relationship between Establishment and Free Exercise concerns was carefully delineated by this Court almost a half-century ago. In *Everson v. Board of Education*, 330 U.S. 1 (1947) plaintiffs urged that a New Jersey statute providing public support of transportation to religious school pupils violated the Establishment Clause. Stressing government's power "to legislate for the public welfare" in order "to meet problems previously left for individual solution" (*id.* at 6-7), the Court inquired whether the Establishment Clause bars general public welfare legislation (in the form of support for the busing of all children) where its particular application would be supportive of religious as well as secular education. *Id.* at 3. Noting the pervasively religious character of the Catholic schools to which transportation under the act would be afforded (*ibid.*), the Court said that New Jersey could not "consistently with the 'establishment of religion' clause . . . contribute tax-raised funds to the

¹³ The Court of Appeals acknowledged that the denial of the aid to James "does impose a burden on their free exercise rights" (A-14), but sought to justify the burden by stating that the School District had a compelling state interest in ensuring that the Establishment Clause was not violated. *Ibid.* The proposition that one First Amendment clause somehow overrides another, is unfounded in any Supreme Court decision. The contrary is suggested in *Widmar v. Vincent*, 454 U.S. 263, 275-276 (1981) and see *Doe v. Small*, 964 F.2d 611, 618-619 (7th Cir. 1992).

support of an institution which teaches the tenets and faith of any church." *Id.* at 16. But the Court then pointed to the limitation which the Free Exercise Clause places upon an absolutist, or secularist, reading of the Establishment Clause:

On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.

Id. at 16. (Emphasis by the Court)

The foregoing teaching of *Everson* plainly applies to the present case. EHA is a generally available public welfare program for the support of all handicapped children. It is sought to be applied here, as the bus program in *Everson* was sought to be applied, *i.e.*, to benefit a child enrolled in a pervasively religious school where the general branches of learning are taught. To attempt to distinguish *Everson* on the ground that the service in *Everson* did not take place within a religious classroom would be to split hairs. In each case, the public service is to enable a child to get both a religious and a secular education. To exclude petitioners in the present case from participation in the benefits of EHA, "because of their faith" (*i.e.*, their religiously based choice of Salpointe), would undeniably inhibit them in the exercise of their religion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 92-94

In The
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband
and wife; JAMES ZOBREST, a minor, by LARRY
and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits a public school district from placing a publicly employed sign language interpreter in a parochial school classroom on a day to day basis to transmit religious and other instruction from parochial school teachers to a deaf student.

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OPINIONS BELOW

Petitioners accurately have identified the applicable opinions below.

JURISDICTION

Respondent agrees with Petitioners' statement concerning jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioners' listing of Constitutional and statutory provisions involved in this matter, except that the listing also should include Art. II, § 12 of the Arizona Constitution, which provides:

Section 12. The liberty of conscience secured by the provisions of this Constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned touching his religious belief in any court of justice to affect the weight of his testimony.

STATEMENT OF THE CASE

This case involves a demand by James Zobrest ("James"), a deaf student, and his parents (collectively the "Zobrests" or "Petitioners"), that Respondent Catalina Foothills School District (the "School District" or the "District"), place a public employee in the classrooms of Salpointe Catholic High School ("Salpointe"), a parochial high school in Tucson, Arizona, to serve as a sign language interpreter. JA 19-26.¹ The Zobrests demand that the interpreter, at public expense, and functioning as a public employee, convey both secular and religious instruction to James.

James, who entered the ninth grade at Salpointe in August, 1988, is profoundly deaf. JA 20, paragraph 5. He resides within the boundaries of the School District and attended the District's public schools for three years prior to enrolling at Salpointe. JA 87, paragraph 5; JA 88, paragraph 14. While he attended District schools, the School District provided him with a sign language interpreter.

In October, 1987, the Zobrests requested the School District to provide an interpreter for James at Salpointe. JA 93-94, paragraph 38. The Zobrests made this request based on the Individuals With Disabilities Education Act,

¹ "JA ____" refers to the Joint Appendix, together with the page number from the Joint Appendix where the citation appears. "R ____" refers to the Record in the United States District Court for the District of Arizona, together with the Docket Entry Number, as designated by the Clerk of the District Court, of the document where the citation appears. The District Court's Docket Sheet is found at JA 1-8.

20 U.S.C. §§ 1400 *et seq.* ("IDEA"),² which they claim not only permitted but required the School District to provide this service. The School District informed the Zobrests that, although it would provide an interpreter for James at any Arizona public high school,³ it would have to determine whether it could lawfully provide one at Salpointe. JA 94, paragraph 39. The School District readily agreed to provide, and throughout James' high school years did provide, speech therapy services for James one and one-half hours per week at a District school. JA 88, paragraph 11.

The School District referred the interpreter issue to the Pima County, Arizona, Attorney's Office, which issued an opinion on April 26, 1988, indicating that the Zobrests' request would violate both the United States Constitution and the Arizona State Constitution. JA 94, paragraph 40; JA 10-18. Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), the County Attorney's opinion was referred to the Arizona Attorney General for review. The Arizona Attorney General issued a concurring opinion on June 27, 1988, agreeing that the fact

² Prior to 1991, the IDEA was known initially as the Education of All Handicapped Children Act, and then as the Education of the Handicapped Act, or the "EHA." Section 901 of Pub.L. 101-476, 104 Stat. 1103 (1990), changed the name references to the Individuals With Disabilities Education Act.

³ During the time period relevant in this case, Catalina Foothills School District did not operate a high school. High school age students residing within the District's boundaries were permitted to attend any Arizona public high school with the public school tuition charge being paid by Catalina Foothills School District. See Arizona Revised Statutes § 15-824(A)(2) and (E)(2).

situation presented would contravene both the state and federal constitutions. JA 94, paragraph 41; JA 9. The School District informed the Zobrests on July 11, 1988, that it would obey the dictates of the Attorney General opinion. JA 94, paragraph 41.

The Zobrests filed suit against the School District in the United States District Court for the District of Arizona on August 3, 1988. R1. On August 12, 1988, the District Court denied the Zobrests' request for a preliminary injunction. JA 52-53. On July 18, 1989, the District Court granted the School District's motion for summary judgment and, solely on constitutional grounds,⁴ dismissed the case. R45. The Court of Appeals for the Ninth

⁴ Both parties' motions for summary judgment raised only federal constitutional issues. Therefore, when the District Court ruled on the federal constitutional issues, all other issues in the case were left adjudicated. The Zobrests assert on numerous occasions in their brief that the School District has conceded that the interpreter services at issue here are legally mandated by the IDEA for every student who voluntarily attends a private school, whether parochial or nonparochial. See Petitioners' Brief on the Merits ("P.Br.") at pp. i, 3, 5, 6, 8-9, 22. This is not the case. The question of whether or not the IDEA requires (as opposed to permits) the School District to furnish James Zobrest with a sign language interpreter at any private school he chooses to attend - whether or not parochial - has never been determined in court or stipulated to by the School District. The School District denied the allegation contained in Petitioner's Amended Complaint in this regard, JA 56, paragraph 15, and the only stipulation on this issue was that the District would have been required to provide an interpreter for James at any PUBLIC high school he chose to attend. JA 88, paragraphs 13, 15. See also footnote 17, *infra*.

Circuit affirmed. *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992).

Salpointe, a private coeducational Catholic high school operating under the direction of the Carmelite Order of the Roman Catholic Church, is pervasively religious in character. JA 90, paragraph 19. Salpointe has as its distinguishing purpose the inculcation in its students of the Roman Catholic faith and morals. JA 90, paragraph 22. It would not exist but for that goal. JA 90, paragraph 22.

Religion is a required subject at Salpointe. JA 90, paragraph 23. In religion class, all students receive formal instruction in the Roman Catholic faith. Mass is celebrated at Salpointe at the beginning of each school day, and Catholic students are strongly encouraged to attend. JA 90, paragraph 24.

The two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe. JA 92, paragraph 31. Salpointe maintains a religious atmosphere within the physical premises of the school through the use of Catholic religious symbols and the observance of Catholic religious customs. JA 92, paragraph 30. Teachers at Salpointe sign a Faculty Employment Agreement that states that the religious programs "are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." JA 90, paragraph 25. The Faculty Employment Agreement requires teachers of both secular and religious topics not only to accept, but also to promote, the relationships between the religious, the academic and the

extracurricular. JA 91-92, paragraphs 26-29. In this regard, Salpointe teachers assist students in experiencing how the presence of God is manifested in nature, in human history, in the struggles for economic and political justice, and in other secular areas of the curriculum. JA 92, paragraph 28. Thus, references or statements of a religious nature may or are likely to occur during the course of any of the class sessions. JA 92, paragraph 32.

The parties have stipulated that, for the purpose of evaluating Establishment Clause considerations, the religious character of Salpointe is not limited in any manner. JA 92, paragraph 33.

The interpreter's active involvement in religious activities within the Salpointe classrooms is undisputed. As the Zobrests note: "[t]hat the interpreter conveys religious messages is a given in this case." P.Br. at 22. The Zobrests have neither attempted to estimate, nor claimed that it is possible to estimate, the amount of time the interpreter would spend on religious as opposed to secular tasks. Rather, the Zobrests' demand in this case is that the School District hire the interpreter, using federal, state and local tax monies,⁵ to interpret during all of

⁵ Although the IDEA provides financial grants to states to assist in the education of disabled children, the federal monies provided cover only a fraction of the costs associated with such programs. The remaining monies come from state and local taxes. For example, during the 1987-1988 fiscal year, federal funds accounted for approximately 11% of the \$190,000,000.00 spent on special education and related services in Arizona. U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children With Disabilities*, A-209 (Table

James' activities at Salpointe, including religion class, Mass and his other classes and extracurricular activities. It is against this background that the issues of this case must be analyzed.

SUMMARY OF ARGUMENT

The Zobrests demand that the School District place a public employee at James Zobrest's side in the pervasively sectarian atmosphere of a parochial school classroom to transmit to James every component of his religious and secular education. However, because the employee at issue here would participate in the transmission of religious concepts, the interpreter's services become directly related to the primary, religious oriented educational goals of both Salpointe and the Zobrests. The interpreter's activities thus have a primary effect of promoting religion.

As a result of the unique nature of the government services at issue here, this case is distinguishable from other cases where this Court has approved government activity that only incidentally aids religion. In this regard, this case does not involve: (1) a hands-off payment of money or a tax deduction where government involvement ends with the disbursement of funds or the tax deduction; (2) religious and secular activities that can be isolated from each other to ensure that government participates only in secular functions; (3) an educational

AH1)(1992) (Filed with the Court by the United States as *Amicus Curiae*).

institution that is other than pervasively sectarian; (4) an educational institution that serves adult students; (5) only a risk, as opposed to a certainty, that the government actually will participate in the communication of spiritual instruction; or (6) a government practice that has received historical acceptance. Rather, this case involves a demand for actual and direct participation by a public employee in religious activities.

The Zobrests' suggested justification that most of the interpreter's communications are secular is contrary to the stipulated facts of this case. In addition, government participation in religious education is inappropriate despite the fact that secular education also is promoted.

The Zobrests' argument that the interpreter is little more than a hearing aid or a machine is unpersuasive for many reasons. Of primary importance is the stipulated fact that the interpreter would be involved in communicating religious information to and from James. Use of public funds to supply either a person or a mechanical device to parochial school students is constitutionally impermissible if, as here, the person or device assists in the task of imparting religious instruction. The interpreter is distinguishable from a hearing aid because a hearing aid is used continuously and has no particular association with a child's parochial school education. In contrast, human services or mechanical devices that are provided only for a student's educational use survive Establishment Clause scrutiny only if the services or devices are used in a purely secular manner. Here, the interpreter would be supplied solely for educational purposes and would serve as a conduit for the transmission of religious information. The interpreter's efforts thus

would violate the Establishment Clause. In addition, because the interpreter is not a mechanical device, but a human being, the potential for political divisiveness, and the appearance of endorsement of religion, are far greater for a publicly employed interpreter as compared to a publicly purchased hearing aid.

The School District is not attacking the IDEA on its face, but rather challenges only this particular application of it. Thus, it is unimportant that a single individual is the focus of this case. In addition, the Zobrests' claim that the requested services are valid *per se* because they emanate from a general welfare benefit program lacks merit because even a general welfare benefit program may, at least in particular applications, improperly promote, endorse or coerce religious orthodoxy. This is such a case.

Because a factual comparison of this case to a formidable line of Supreme Court cases demonstrates that the Zobrests' demands are unconstitutional, reassessment of the *Lemon* test is not necessary. Nevertheless, the School District would prevail in this case not only under a *Lemon* analysis, but also using an endorsement analysis, a non-coercion-proselytization analysis or an analysis of historical traditions. The Zobrests' demand, in effect, is that the state assist religious proselytization. Their demand, if sustained, would coerce the School District and its administrators, employees and taxpaying constituents to provide the means by which James Zobrest seeks to develop spiritually.

Finally, the School District's decision not to assist James' religious development does not unconstitutionally inhibit his practice of religion because the IDEA does not

legally compel the School District to conform to the Zobrests' religious wishes. Moreover, the School District's decision is appropriate to avoid a violation of state and federal constitutional principles and policies.

No precedent of this Court has ever permitted government to lend its resources and assistance directly to the pursuit of a religious educational mission. To do so now would run contrary to decades of firmly established First Amendment jurisprudence.

ARGUMENT

I. A LEGAL MANDATE TO PLACE A PUBLICLY EMPLOYED SIGN LANGUAGE INTERPRETER IN A PAROCHIAL SCHOOL CLASSROOM CANNOT BE RECONCILED WITH EXISTING PRECEDENTS

If this Court were to grant the relief desired by the Zobrests, it would, for the first time, authorize the placement of a public employee in a parochial school classroom to assist directly in the inculcation of religious values to a student. In every class session over the course of James' four years of high school, the public employee would serve as a conduit for all religious and non-religious observances and communications to and from James Zobrest, thereby becoming an indispensable component in James' religious development and education. At public expense, the sign language interpreter would become James' and Salpointe's partner and coparticipant in James' religious studies. This direct, day in and day out governmental participation in religious education cannot be reconciled with the First Amendment.

As important as it is to determine what this case involves in terms of identifying and applying Constitutional principles, it is equally important to recognize what it does not involve. This case does not remotely involve any fact situation where this Court previously has approved government activity that incidentally aided religion.

First, despite the Zobrests' extensive reliance on *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*, 463 U.S. 388 (1983), P.Br. at 15-17, this case involves neither a statutory scheme whereby a disabled student is provided funds⁶ to defray educational expenses nor a scheme permitting a tax credit or deduction for this same purpose. If such were the case, then the sign language interpreter would be the student's employee, not the School District's, and governmental involvement in the enterprise would end with the disbursement of funds or the granting of the tax credit or deduction. By contrast, here the government's involvement does not end with a one time payment, as in *Witters*, or a tax deduction, as in *Mueller*. Rather, in this case, government involvement and participation in James Zobrest's religious development and education would continue every day that James attends Salpointe.

⁶ The IDEA does not authorize a school district to pay monies to a student or his or her parents so that the student and the parents can obtain for themselves the special education services. The constitutionality of such a direct funding scheme is immaterial because (i) Congress has not yet provided for such and (ii) the facts of this case concern the Zobrests' unambiguous demand for a publicly employed interpreter. JA 24.

This also is not a case where public assistance to private education can be upheld because the religious aspects of the institution can be and have been isolated from the secular aspects and the assistance flows only to secular functions or activities. See *Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (approving the provision of funds to parochial schools for standardized testing because the secular content of the tests could be verified in advance); *Wolman v. Walter*, 433 U.S. 229 (1977) (approving the provision of textbooks, standardized tests and diagnostic services to parochial schools with verification of secular content); *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976) (approving state grants for secular purposes to private, religiously affiliated colleges because the colleges receiving aid were not so pervasively sectarian as to preclude a separation between secular and religious activities); *Meek v. Pittenger*, 421 U.S. 349 (1975) (approving the provision of textbooks whose purely secular contents could be verified in advance); *Hunt v. McNair*, 413 U.S. 734 (1973) (approving expenditures of public bond monies to finance a construction project at a religiously affiliated college to be used only for secular purposes); *Tilton v. Richardson*, 403 U.S. 672 (1971) (approving public monies spent to provide secular-use buildings on religiously affiliated college campuses because the secular and religious functions of the campus facilities at issue could be distinguished); *Board of Education v. Allen*, 392 U.S. 236 (1968) (approving the provision of textbooks whose secular contents could be verified in advance).

In contrast with the above cases, in this case the Zobrests' demand is that the interpreter's publicly

financed efforts include interpreting Mass, religion class and all of the other religious references made in James' classes throughout the day.

In addition, this is not a case involving only the possibility, as opposed to a certainty, of government participation in religious education. See *Aguilar v. Felton*, 473 U.S. 402 (1985) (Title I funds may not be used to pay public employees to provide remedial instruction within parochial schools because of the potential risk that they may be induced to teach religious values); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) (state supported remedial instruction and community education programs in parochial schools condemned because religious instruction might occur); *Wolman v. Walter*, 433 U.S. 229 (1977) (instructional materials may not be provided to parochial school students at public expense because the instructional materials might be subverted toward religious ends). In contrast with the above cited cases, this case involves more than just the possibility that the public employee would be involved in religious instruction. As Petitioners themselves poignantly state: "[t]hat the interpreter conveys religious messages is a given in this case." P.Br. at 22. Thus, this case presents a much stronger case than does *Aguilar*, *Grand Rapids*, or *Wolman* with respect to the existence of constitutionally inappropriate conduct.

This also is not a case involving higher education, where the maturity of the students can be expected to be at an adult level. See *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young

adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.""); *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) (recognizing the "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools").

In addition, this case must be distinguished from those where the religious institution at issue is not pervasively sectarian. See *Bowen v. Kendrick*, 487 U.S. 589, 620 (1988) (facial Establishment Clause attack against the Adolescent Family Life Act, 42 U.S.C. §§ 300z et seq., unsuccessful because none of the recipients of federal funds was found to be pervasively sectarian; the Court noting that "as applied" challenges would be available if a particular recipient was determined to be pervasively sectarian); *Tilton v. Richardson*, supra, (construction grants to religiously affiliated colleges for facilities restricted to secular uses upheld because the colleges at issue were not pervasively sectarian).

Finally, this case does not involve a traditional government practice that has existed relatively unchallenged throughout this country's history. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (Chaplain's prayer in a state legislature is permissible because it is supported by tradition and 200 years of unchallenged history).

In summary, this case is distinguishable from those where this Court previously has permitted government activity at religiously affiliated schools. In this case, James requires the direct assistance of two specially trained individuals in order to receive an education: a

teacher and an interpreter. These two adults must work together day in and day out⁷ to educate James. Each of these two persons is active in and indispensable to the educational process. The legal difficulty in this case results from the Zobrests' demand that one member of this instructional team be a parochial school teacher conveying religious as well as secular instruction and the other be a public employee. No existing precedent permits this.

II. UNDER PRECEDENTS FOLLOWING THE TEST SET OUT IN *LEMON V. KURTZMAN*, THE PLACEMENT OF A PUBLIC EMPLOYEE TO PROVIDE SIGN LANGUAGE INTERPRETER SERVICES IN PAROCHIAL SCHOOL CLASSROOMS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court defined a three part test to assist in determining Establishment Clause violations. This test, which has come to be known as the "*Lemon*" test, is considered particularly applicable to cases involving the education of primary and secondary school age children. *Grand Rapids School*

⁷ The School District is not suggesting that all situations where a public employee is in or about a parochial classroom on a daily basis raise constitutional issues as serious as those raised in this case. For example, in a situation where a parochial school student requires clean intermittent catheterization of the type described in *Irving Independent School District v. Tatro*, 468 U.S. 883, 885 (1984), a public employee providing the needed service would not be involved directly in the process of imparting religious instruction. See generally, *Bowen v. Kendrick*, 487 U.S. 589, 624-25 (1988) (Kennedy, J., concurring).

District v. Ball, 473 U.S. 373, 383 (1985). The *Lemon* test condemns government action if its purpose is other than secular, if its primary effect is to benefit or promote religion, or if the government activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-613.

The School District concedes that the IDEA has an appropriate "secular purpose." The present controversy centers instead on the second and third prongs of the *Lemon* test – primary effect and excessive entanglement. A review of the judicial decisions applying these two parts of the *Lemon* test reveals that the lower court decisions in this case should be affirmed.

A. The Placement Of A Publicly Employed Interpreter In A Catholic Classroom Has the Primary Effect of Benefitting and Promoting Religion.

In this case, the publicly financed interpreter services at issue would facilitate religious instruction and other religious activities being offered to James Zobrest in Salpointe's parochial school classrooms. Because of this direct involvement in religious instruction and religious activities, the services the interpreter provides would have the primary effect of benefitting and promoting the religious goals of both the Zobrests and Salpointe.

The Zobrests place emphasis on cases that permitted loans of secular textbooks directly to parochial students or allowed public busing of parochial students or permitted other "incidental" forms of public assistance. See *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Education v. Allen*, 392 U.S. 236

(1968); *Everson v. Board of Education*, 330 U.S. 1 (1947). P.Br. at 19-20. In *Meek v. Pittenger*, however, this Court explained that government aid provided to a religious school is permissible as an "incidental benefit" only when that aid constitutes "secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school." *Meek*, 421 U.S. at 364 (emphasis supplied). Secular textbooks may be provided in private schools, therefore, because it is relatively easy to verify in advance that their contents are in fact completely secular. *Meek v. Pittenger*, 421 U.S. 349, 362 (1975); *Board of Education v. Allen*, 392 U.S. 236, 245 (1968). The state may not provide religious texts, even if they were provided to the children rather than to the school. *Board of Education v. Allen*, 392 U.S. 236, 244-45 (1968). Similarly, transportation services to or from school are permissible because by their very nature they are separate from the educational activities occurring in the classroom. See *Wolman v. Walter*, 433 U.S. 229, 253-54 (1977). In contrast, transportation services cannot be provided for private school field trips because these services are more closely linked with the actual education process. *Id.*

Despite the fact that secular textbooks and certain transportation services can be provided to parochial school students, educational materials and mechanical devices such as projectors, tape recorders, record players, maps, globes, science kits and weather forecasting charts may not be provided. See *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362-66 (1975). These instructional materials provide more than an "incidental benefit" to pervasively sectarian schools

because of the possibility that they could be used, intentionally or unintentionally, for religious purposes and to facilitate religious instruction. *Id.* at 366. So it is with the interpreter in the present case. His or her services would facilitate and become directly involved in Salpointe's mission of nurturing Christian ideals in its students through the communication of religious concepts and values.

Importantly, the Zobrests chose Salpointe over a public school *solely* to further James Zobrest's religious development. JA 89, paragraph 16. The interpreter, therefore, not only would further the religious mission of the school, but also would substantially and directly further the religious mission of the Zobrests. Viewed either way, the requested government aid would be improper.

B. The Placement Of A Publicly Employed Interpreter In A Parochial School Classroom Creates Excessive Entanglements Between Church And State.

Because Salpointe is "pervasively religious in character," JA 90, paragraph 19, the continuing presence of a publicly employed sign language interpreter in every class session that James attends at Salpointe, and the interpreter's continuing involvement in all religious and nonreligious activity conducted therein, constitute a continuing and excessive entanglement in violation of the third prong of the *Lemon* test.

The Zobrests summarily dismiss this entanglement between the School District and James' religious education, and suggest that, like the permissible diagnostic services in *Wolman v. Walter*, 433 U.S. 229 (1977), there is little or no danger of government participation in the religious function of Salpointe. P.Br. at 17. The Zobrests then suggest that the sign language interpreter's code of ethics precludes him from participating in religious instruction. *Id.* The Zobrests are wrong. The sign language interpreter's code of ethics is precisely what makes the interpreter an active participant in every religious discussion that occurs in James' classes. In this regard, it must be remembered that the likelihood of religious communications at Salpointe, even in secular classes such as government, science or history, is far from the speculative danger noted in *Wolman* - it is a stipulated fact. JA 92, paragraphs 28-32. This day to day participation by the sign language interpreter in James Zobrest's religious development presents unconstitutional entanglement.

This case involves the classic entanglements that were feared by the Court when the entanglement concept was first developed in *Walz v. Tax Commission*, 397 U.S. 664 (1970), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As originally conceived, the entanglement prong of the *Lemon* test prohibited situations where government action produced ongoing, actual and direct interaction between government and religion, or "a kind of continuing day to day relationship" between employees of the public entity and representatives of the religious organization. *Walz*, 397 U.S. at 674. This is not a case where the entanglements involve no more than public administrative supervision designed to guard against speculative risks of

public intrusion into religious education. See *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). This also is not a case involving a one time financial grant such as the one approved in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), or a tax deduction such as the one approved in *Mueller v. Allen*, 463 U.S. 388 (1983). In these cases the relationship between the state and religion did not continue beyond the disbursement of funds or the tax deduction. This case, in contrast, involves actual, continuing day to day involvement of a public employee in a student's religious education.

There also would be substantial entanglements resulting from evaluation of the interpreter's job performance, which is needed for salary and other employment-related issues, as well as for issues related to the District's responsibilities under the IDEA.⁸ Because the sign language interpreter would be a publicly paid employee, he or she would be subject to School District policies, supervision and evaluations, and even possible disciplinary

⁸ These responsibilities include a required annual meeting to discuss, develop and, if necessary, modify each student's individualized education plan. Persons who must attend this meeting and who jointly are expected to develop the student's individualized education plan include the student's parents, the student if appropriate, District special education professionals and at least one of the student's teachers, which in this case would be a parochial school teacher. 34 C.F.R. §§ 300.343 and 300.344.

action,⁹ all of which would contribute to the entanglements between Salpointe and the School District.

C. The Reasons Presented by Petitioners To Justify Public Participation In Religious Instruction Lack Merit.

The Zobrests make four arguments that they claim distinguish this case from precedents that preclude governmental participation in religious education. Their arguments are that (1) the religious indoctrination constitutes only a modest portion of all of the instruction provided at Salpointe, P.Br. at 9-11; (2) the sign language interpreter is little more than a machine, such as a hearing aid, P.Br. at 17-18; (3) a single sign language interpreter does not constitute a massive intrusion upon religion, P.Br. at 19; and (4) the sign language interpreter's presence in parochial classrooms should be permissible *per se* because the interpreter would be provided as part of a general welfare benefit program. P.Br. at 15-17. These arguments, however, neither provide a meaningful distinction to the established precedents nor

⁹ The entanglements would be particularly acute if it became necessary for the District to consider taking adverse job action such as a reprimand, suspension or dismissal. See, e.g., *Sedalia School District v. Missouri Commission on Human Rights*, Case No. 45447 (slip opinion) (Mo.App. 1992) (public school district justified in firing high school sign language interpreter who modified language she found objectionable). In such a situation, the right of the interpreter to receive due process may create the need for extensive administrative interaction and cooperation between School District administrators and parochial school employees.

justify the unconstitutional effect of the interpreter's activities. Each of the Zobrests' arguments will be addressed in order below:

1. Initially, the Zobrests argue that the effect of assisting religious practice and education somehow is diluted because the interpreter communicates mostly secular instruction or that, when compared to secular communications, the religious communications constitute only a modest portion of the total instruction provided at Salpointe. P.Br. at 9-11.¹⁰ This argument fails for at least two reasons. First, the Zobrests' assertion is contrary to the stipulated facts in this case, including the fact that the religious educational activities and discussions at Salpointe "are not separate from the [secular] academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other." JA 91, paragraph 25. Thus, purely secular instruction does not exist at Salpointe. Stated in another manner, the Zobrests cannot now ignore their own stipulation that the religious character of Salpointe is not limited in any material manner. JA 92, paragraph 33.

More importantly, the Establishment Clause does not excuse governmental participation in religion simply because, as the Zobrests suggest, a substantial amount of

¹⁰ The Zobrests state in their brief that "[t]he services of the interpreter for James at Salpointe produced *multiple* effects, most of these being identical to the secular effects produced in public schools and undeniably constituting, quantitatively, the predominant education effect." P.Br. at 10 (emphasis in original). This statement recognizes, implicitly if not expressly, that one effect of the interpreter's publicly financed efforts would be to further James' religious development.

secular instruction also is assisted. A government program to provide textbooks to needy parochial school students could not also provide copies of the Bible or the Koran to these students, even if these religious books constituted only a relatively minor percentage of the books provided. Similarly, the prayers in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), were not excused even though their duration encompassed only a few minutes in a program lasting several hours. The practical effect of the Zobrests' argument would be that public school students could be taught to read by using scriptures or that the buildings described in *Tilton v. Richardson*, 402 U.S. 672 (1971), could be used for religious instruction, so long as the ratio of these religious activities to other secular activities did not exceed some undefined percentage. This is clearly incorrect and untenable: "[A]ny use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (emphasis in original).

2. The Zobrests next seek to minimize or mitigate the role of the sign language interpreter by characterizing the would-be public employee as a machine, such as a hearing aid, that mechanically repeats to James the religious information that is disseminated by the Salpointe faculty. P.Br. at 17-18. This argument fails, however, for a number of reasons. Initially, and perhaps most importantly, government may not place even a "machine" in a parochial school if the machine has the potential to be used to facilitate religious instruction. *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975), hold unequivocally that "projectors, tape recorders, record players, maps and globes, science kits,

weather forecasting charts, and the like," *Wolman*, 433 U.S. at 249, may not be placed at government expense in a pervasively sectarian school atmosphere. *Wolman*, 433 U.S. at 248-51; *Meek*, 421 U.S. at 362-66. To the extent that a sign language interpreter may be construed to be a machine, the use of an interpreter to facilitate religious instruction in a pervasively sectarian-parochial school cannot be reconciled with *Meek* and *Wolman*.

In fact, the sign language interpreter in this case goes beyond the seemingly secular mechanical devices and instructional materials condemned in *Meek* and *Wolman*. The decisions in *Meek* and *Wolman* turned on the pervasively sectarian nature of the educational institutions benefitted by the aid, because at these schools secular education and the religious mission were "inextricably intertwined." *Meek*, 421 U.S. at 366. Thus, although the mechanical devices and instructional materials "ostensibly" appeared to be secular and neutral, the Court concluded that, because of the pervasively sectarian setting, the possibility existed that they could be used in religious activities. *Meek*, 421 U.S. at 366. This case requires none of the extended analysis employed in *Meek* and *Wolman*. This is because the stipulated facts here are that the sign language interpreter definitely would be used to assist religious instruction at Salpointe.

It is not sufficient to argue that a public employee's participation in religious indoctrination is permissible because it is in some manner "mechanical." It is still actual and direct involvement in religious indoctrination, which always has been and must remain constitutionally impermissible. A few examples bear this out. A publicly paid teacher could not lead the class in a religious prayer,

even if the teacher happened to be an atheist and was reading without comment from scripts chosen daily by students or others. See generally, *Abington School District v. Schempp*, 374 U.S. 203 (1963). Similarly, public funds could not be used to set up and operate a print shop at Salpointe Catholic High School to photocopy "mechanically" items submitted by the Salpointe faculty if such photocopying would include religious books and materials. This is true even if we assume that the publicly paid employees in the print shop would be obligated to copy only those items submitted by faculty members and would not be permitted to designate items to be copied or alter their contents. It remains true even if the print shop copied many more secular educational materials than religious materials. The Establishment Clause simply would not permit this public resource to be used to provide multiple copies of the day's scripture lesson.

Finally, assume that the Arizona legislature, after determining that a certain class of disadvantaged students in both public and private schools would benefit significantly by being read to more frequently, funds the hiring of "readers" to read for one hour each day to these students. Assume further that this funding scheme provides that the school principal at each school designates the items to be read to the students, which task is then accomplished without explanation, comment or alteration by the "reader." Would the Establishment Clause permit this activity to occur in parochial school classrooms if the readers are given religious as well as secular materials to read? Of course not. The First Amendment would prohibit this result despite the fact that the reading is being

done by public employees in a purely "mechanical" fashion.

Stated in the context of this case, public funds cannot be used to employ a person whose job it is to inform James Zobrest that Christ died to save him from his sins, or that there is life after death, even if the public employee is relaying that message from another person.

The Zobrests' analogy to a hearing aid also is unpersuasive because there is a critical difference between a hearing aid and a public employee doing the work of a hearing aid in a parochial school classroom. This difference is the association between the public assistance and the religious educational atmosphere.¹¹ A hearing aid is something that generally is used all the time and has no particular association with education (even if educational authorities supply the hearing aid). A public employee, on the other hand, hired solely to assist in the parochial education of a student, is more analogous to the tape recorders, record players and other mechanical devices and instructional materials addressed in *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975). Unlike a hearing aid, the interpreter here and the

¹¹ This Court has previously expressed concerns that, in appropriate cases, a symbolic union between church and state presents constitutional problems. *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985). A public employee hired solely to assist James in receiving a parochial education creates such a symbolic union to an extent that does not occur with the provision of an inanimate hearing aid.

mechanical devices and instructional materials condemned in *Meek* and *Wolman* are designated for the singular purpose of facilitating instruction. Established precedent prohibits the placement of these latter items into the pervasively sectarian atmosphere of a parochial school.

Finally, the Zobrests' hearing aid analogy is unpersuasive because a human being simply is not a hearing aid. A reasonable person reacts much differently to the presence of a public employee in a parochial school classroom than that person does to the existence of a publicly purchased hearing aid. The appearance of endorsement, see *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J. concurring), as well as the potential for political divisiveness, *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971), is drastically different when a publicly purchased hearing aid is compared to a public employee who sits daily in a parochial school classroom delivering religious as well as secular information to a student. The interpreter reasonably would be viewed as a part of the educational "team" serving James Zobrest. A hearing aid would not.

In this regard, what happens "between classes" also must be considered. The sign language interpreter would accompany James Zobrest on a continuous basis at school and would be one of the few people if not the only person there with whom James could communicate directly with ease. James undoubtedly would engage in normal day to day conversations with the interpreter on topics such as sports, the weather and so on. It is at least as likely that their conversations on some occasions would relate to James' schooling. If James asks the interpreter a question

concerning either a teacher's lesson that day or a discussion that occurred in class, what is the interpreter supposed to do? Not respond? Can he or she respond? Or can the interpreter respond only if he or she believes that the lesson or discussion being referenced was secular in nature? We simply cannot anticipate that James Zobrest would spend twenty-five hours a week in close contact with another person without developing a normal interpersonal relationship with him or her.¹²

In summary, the sign language interpreter cannot be excused as nothing more than a "hearing aid." Established precedents demonstrate that not even mechanical devices may be provided to parochial school students for their use in school unless the use of such items can be limited to purely secular activities. The hearing aid analogy itself is unpersuasive because hearing aids are provided for general use, as opposed to strictly educational use. In contrast, the interpreter in the present case would be provided solely for educational purposes and his or her efforts would not be limited to secular activities. Given these circumstances, no analogy can change the

¹² The Zobrests make the statement in their brief that James Zobrest was not sent to Salpointe to become a religious "zombie." P.Br. at 10. The School District agrees but points out that neither is the interpreter a "zombie." The Zobrests' attempt to turn the interpreter into an emotionless, nameless machine flies in the face of human logic. Just because the School District does not contest the fact that, when interpreting, the interpreter will not violate applicable canons of ethics, does not mean that the interpreter at other times will be devoid of thoughts and opinions or that he or she will communicate and interact with James or others at Salpointe in other than a normal fashion.

fact that the interpreter's activities would violate the First Amendment.

3. The Zobrests also suggest that the government's participation in religious instruction at issue here should be permitted because this case involves only one sign language interpreter for one student,¹³ rather than the large scale programs condemned in *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975). P.Br. at 19. This position, however, ignores the obvious fact that the precedential impact of this case will be much greater than "one interpreter."¹⁴ More importantly, however, the Zobrests' argument about "one interpreter" might be more persuasive if the School District was attacking the IDEA on its face, which it is not doing, instead of objecting only to the application of this statutory scheme to the particular fact situation under review. See *Bowen v. Kendrick*, 487 U.S. 589, 601-02 (1988) (Adolescent Family Life Act, 42 U.S.C. §§ 300z et seq., upheld against a facial Establishment Clause attack with the limitation that particular applications remain subject to challenge).

¹³ The Zobrests claimed previously that this case will have substantial nationwide impact, particularly with respect to the education of disabled children. See Petition for Writ of Certiorari at 11-12. Thus, they cannot in good faith claim that this case involves no more than the single sign language interpreter at Salpointe.

¹⁴ In 1990-1991 the IDEA served 4.3 million students, including 60,000 hearing impaired children. See Brief of United States as Amicus Curiae at 4. It is also important to recognize that a significant number of special education students require the assistance of one on one teacher's aides to assist them in the classroom.

Under the School District's narrow "as applied" challenge, it makes no sense to argue that the proportion of public funds being used inappropriately is relatively small. Arizona could not hire one teacher to teach class at Salpointe for the same reasons that it could not hire five hundred teachers to teach in parochial schools across the state. Public funds could not be used to pay for Bibles for use by one religious studies class at Salpointe for the same reasons that Bibles could not be purchased with public funds for every parochial school student in Arizona. In this regard, the one sign language interpreter at issue in this case, who by stipulation would be involved in religious activities, fares worse than the millions of dollars worth of services and materials that were condemned in *Aguilar v. Felton*, 473 U.S. 402 (1985), *Wolman v. Walter*, 433 U.S. 229 (1977) and *Meek v. Pittenger*, 421 U.S. 349 (1975), where the services and materials only had the potential to be subverted to religious use.

4. Finally, the Zobrests suggest that the Establishment Clause is satisfied whenever the government provides a general welfare benefit program to a large class of persons defined without regard to the religious/non-religious and public/nonpublic nature of the persons or institutions benefitted, especially where any aid to religion results from what they term private choices of individual beneficiaries. P.Br. at 15-17. In support of this proposition, they rely on *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487-88 (1986) and *Mueller v. Allen*, 463 U.S. 388, 398 (1983). The Zobrests' argument in this regard is fatally flawed, however, because no court has ever said that application of a general welfare benefit program of the type described

above always satisfies the Establishment Clause. To the contrary, a general welfare benefit program will be deemed to violate the Establishment Clause if, as in this particular case, it has the effect of providing a direct subsidy to religious instruction and development, see *Witters*, 474 U.S. at 487; *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988), or, also as here, it fails to maintain a secular, neutral and nonideological content. See *Tilton v. Richardson*, 403 U.S. 672, 687 (1971).

Situations easily can be envisioned where particular applications of a general welfare benefit program would have the effect of promoting or subsidizing religious activity and therefore would be unconstitutional. For example, a general welfare benefit program that would provide all school children with assigned texts free of charge for every class of any accredited school they choose to attend, whether public or private, would result in the purchase and provision of religious texts at public expense, which is constitutionally prohibited. See *Board of Education v. Allen*, 392 U.S. 236, 248 (1968).

As another example, assume that Congress, after determining that a certain class of disadvantaged children are in need of tutorial services to supplement their schooling, passes a "general welfare" law to provide to each such student one hour per week of tutoring services at the student's school of choice. For a disadvantaged child enrolled in a parochial school and performing poorly in religion class, however, the publicly employed tutor's statutorily mandated job duties obviously would run afoul of the Establishment Clause.

As a final example, apply the IDEA itself to any student who makes the "private choice" to attend a parochial school but requires, due to a disability, a one on one aide in the classroom to assist the student educationally. Because the aide in effect would be team teaching with the parochial school teachers, this relatively common situation could not be facilitated by the IDEA without running afoul of Establishment Clause limitations.

The above examples demonstrate that well intentioned general welfare benefit programs, including ones that operate in most instances within legal bounds, can have specific applications that are constitutionally prohibited. This is true even though the constitutionally prohibited fact situations result from the "private choices" of students to attend parochial schools.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), this Court held that a general welfare benefit program no more than incidentally assists religious education and is thus permissible only where the aid is "in the form of secular, neutral or nonideological services, facilities or materials." *Id.* at 687. Therefore, in *Tilton*, the Court approved the use of public funds to construct secular use buildings on religiously affiliated college campuses, but struck down as unconstitutional a provision in the same statute that limited the secular use requirement to twenty years. *Id.* at 684. Similarly, in *Bowen v. Kendrick*, 487 U.S. 589 (1988), an act providing federal monies to pay for services and research in the area of premarital and adolescent sexual relations was determined to be a general welfare benefit program capable of surviving a facial Establishment

Clause challenge. The Court remanded the matter, however, to determine whether, in particular situations, aid under the act flowed to pervasively sectarian institutions, *Id.* at 621.

In the present case, the School District poses no facial challenge to the IDEA. Rather, it supports generally the concepts and goals embodied in the IDEA, even as applied to private schools of all types.¹⁵ It objects only to those situations where the IDEA's application would require one of its employees to become involved in any manner with religious indoctrination. The School District also acknowledges that the vast majority of IDEA services are provided in a manner consistent with Establishment Clause limitations. As the instant case demonstrates, however, situations can exist where publicly funded special education services cross the line defined by *Witters* and *Mueller* so as to involve government in religious activities. Because the publicly employed interpreter at issue in this case is directly involved in, and becomes an essential component in, James' religious education, his or her efforts cross this line and cease to be "secular, neutral [and] nonideological." *Tilton v. Richardson*, 403 U.S. at 687. As such, the interpreter's services cannot be constitutionally justified as a general welfare benefit.

¹⁵ For example, in this very case, the School District provided James offsite speech therapy throughout his high school tenure. JA 88, paragraph 11. It also supported James' decision to attend Salpointe rather than public school. R 10, Exhibit B. The School District notes that the offsite speech therapy probably assisted James considerably in completing successfully his religious education, a fact about which the School District has no objection.

III. UNDER ANY FORMULATION OF ESTABLISHMENT CLAUSE ANALYSIS, A PUBLIC EMPLOYEE MAY NOT INTERPRET RELIGIOUS INSTRUCTION IN A PAROCHIAL SCHOOL CLASSROOM.

The direct and continuous commingling of the functions of government and religious education that are at issue in this case cannot be reconciled with the First Amendment, regardless of whether the legal analysis used is the traditional *Lemon* formulation, an endorsement inquiry, see *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), a coercion-proselytization inquiry, see *Allegheny County v. Greater Pittsburgh ALCU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part), or a historical framework analysis. See *Lee v. Weisman*, 112 S.Ct. 2649, 2679 (1992) (Scalia, J., dissenting).

A. Existing Precedent Demonstrates That The Interpreter's Proposed Duties Would Violate The Establishment Clause.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court found it unnecessary to reconsider the Establishment Clause analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court in *Lee* found it sufficient to look at "controlling precedents" relating to prayer and religious exercises in the public schools to reach its holding that public schools could not permit invocations or benedictions at their graduation ceremonies. 112 S.Ct. at 2655.

Likewise, the present case can be decided without the necessity of restructuring twenty years of Establishment Clause jurisprudence. While *Lee* involved the narrow issue of whether public school officials could promote, coerce or endorse participation in a religious activity, the present case involves the similarly narrow issues of whether, under the purported justification of operating "mechanically," a public school employee may assist a student in receiving a religious education in a parochial school classroom, and whether public school officials and taxpayers can be legally coerced to fund this public employee to do so. A review of various cases decided since *Lemon* demonstrates that this case clearly falls within the range of prohibited conduct, without regard to where the outer limits should (or could) be drawn.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court struck down state statutes that attempted to subsidize secular instruction in private schools. Because the public employee in the present case would be hired to facilitate religious as well as secular instruction, his or her employment, with public funds, would present a far worse situation than that found in *Lemon*.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), a twenty year limitation on a restriction prohibiting religious use of publicly funded buildings constructed at religiously affiliated colleges was stricken as unconstitutional. The Court in *Tilton* noted expressly that public benefits and services could be provided to religiously affiliated institutions only so long as their secular content and secular use could be reasonably assured. *Id.* at 687. No such assurance is possible in the present case; to the contrary, a religious use of the public employee in this case is a

stipulated fact. It is also important to note that the interpreter at issue here is no more "mechanical" than were the buildings in *Tilton*.

Likewise, in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court struck down state grants to private schools for maintenance and repair of facilities. As in the present case, the aid in *Nyquist* was condemned because the funds directly assisted both the secular and the religious aspects of the schools' operations, and there was no way adequately to separate the two functions.

In *Levitt v. Committee For Public Education*, 413 U.S. 472 (1973), the Court refused to permit the expenditure of public funds for nonstandardized testing and record keeping materials and services because of the danger that the teacher-prepared tests might be used to assist in the transmission of religious principles. The only material differences between *Levitt* and this case are that in *Levitt*, the vehicle for potential transmission of religious information was testing materials and services, whereas in the present case, the vehicle for transmission of religious information, which would be certain to occur, is the interpreter.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), the Court rejected attempts to apply public funds to pay for instructional materials and mechanical devices that had the potential to be used as tools to transmit religious instruction in parochial schools. In addition, public employees were precluded from coming onto private school grounds to provide auxiliary educational services and therapeutic services. The sign language interpreter in the present case is no less a

vehicle for religious instruction than the instructional materials and mechanical devices condemned in *Meek* and *Wolman*, and involves significantly greater interaction with the actual process of religious instruction than did either the therapists in *Wolman* or the auxiliary instructors in *Meek*.

In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court struck down government schemes to provide remedial instruction in secular subjects by public employees on the premises of private schools. The Court in *Grand Rapids* also prohibited the hiring of private school employees to provide onsite community education services. The primary distinction between this case and the onsite services condemned in *Grand Rapids* and *Aguilar* is that the danger of government funded transmission of religious instruction was only speculative in *Grand Rapids* and *Aguilar*, but nonetheless deemed prohibited by the Establishment Clause, whereas in this case the publicly funded transmission of religious dogma is a factual certainty.

Finally, in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court held that the Establishment Clause does not permit school officials to invite clergy to offer invocations and benedictions at public school graduation ceremonies. If the Court's precedents do not permit school officials to

allow clergy to offer brief prayers at a graduation ceremony, then the Court's precedents would not permit a public employee to assist in the direct proselytization of a student.

The above cases compel the conclusion that the decisions of the District Court and Court of Appeals in this case should be affirmed. A ruling to the contrary would be made at the expense of decades of Establishment Clause jurisprudence.

It is not right – it is not constitutionally healthy – that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 45 (1989) (Scalia, J., dissenting).

B. The Government's Activities In A Parochial School Classroom In This Case Constitute Improper Endorsement, Coercion And Proselytization Of Religion And Are Without Historical Support.

No matter how this case may be dissected or analyzed, the public aid demanded by the Zobrests is unlawful. The result would be the same using an endorsement formulation, a noncoercion-proselytization formulation, or a historical framework formulation, as it is under a current application of the *Lemon* test.

Under an endorsement analysis, the government may not engage in activities that a reasonable person would

feel favor or endorse a particular religion or religion in general. *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Accordingly, improper endorsement of religion occurred in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), when public funds were used to pay parochial school teachers to instruct community education courses in the parochial schools. Religion was endorsed because government resources assisted parochial school teachers who were "accustomed to bring religion to play in everything they teach." *Id.* at 400 (O'Connor, J., concurring in the judgment in part and dissenting in part). Likewise, in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), government improperly endorsed religion when school officials permitted a rabbi to offer brief prayers at a public school function. Endorsement of religion is no less present here than it was in *Lee* because here the public employee actually participates in the transmission of religious information from a parochial school teacher to his audience, in this case the audience being a student.

Endorsement is viewed from the vantage point of a reasonable nonbeliever, *Lee*, 112 S.Ct. at 2658, and becomes unlawful even if the activity being challenged would seem, to most believers, to be reasonable. *Id.* Very reasonable nonbelievers would view the present case as the actual use of the machinery of government to assist in the transmission of religious orthodoxy within a parochial school classroom. In addition, "government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." *Id.* at 2664 (Blackmun, J., concurring). In the present case, the School District Governing Board members and their employees and local taxpayers, as well as

the interpreter, are faced with pressure, attempted to be exerted by the Zobrests through the force of federal law, to participate in James' religious upbringing. The compulsion here is just as real as in *Lee*.

Another suggested formulation of Establishment Clause analysis is what may be termed a "noncoercion-proselytization" analysis. This analysis contemplates that the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in society. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The principle that government may accommodate religion, however, does not supersede fundamental limitations imposed by the Establishment Clause:

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'

Lee v. Weisman, 112 S.Ct. 2649, 2655 (1992), quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

The elements of coercive governmental intrusion upon religion include excessive sponsorship, proselytization and compulsion for the benefit of religion. See *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 659-60 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). These elements are present

in this case.¹⁶ First, the Zobrests demand that government sponsor a necessary and substantial component of James' religious education, without which James could not participate in religious activities in the classroom. Secondly, the services demanded amount to publicly assisted proselytization. To the extent that the beliefs and principles of the Catholic faith are impressed upon James at school, this proselytization is facilitated by a public employee's efforts. Government may not accompany a street missionary and rebroadcast the missionary's message as he goes door to door seeking converts. Likewise, government may not accompany James into his religious classroom for the express (and stipulated) purpose of giving and receiving the ideals and principles that are so central to the Catholic educational process.

Finally, and perhaps most importantly, the public services demanded by the Zobrests would constitute unacceptable coercion in favor of religion because the public would be coerced to apply its tax dollars to assist in James Zobrest's spiritual development, and the School District's Governing Board members and employees, including the interpreter, would be coerced to participate in that development.

¹⁶ The Court has noted that coercion is not a necessary element of an Establishment Clause violation. *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963). However, as Justice Blackmun noted in *Lee*, the Establishment Clause will be violated if coercion is found to exist. 112 S.Ct. at 2664 (Blackmun, J., concurring).

Unlawful coercion need not necessarily take the form of a direct governmental compulsion to follow a particular faith or creed. Rather, unlawful coercion may occur in indirect forms such as taxation where public monies are used to support religious activity. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 659-61 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). Improper coercion also can take the form of "subtle" and "indirect" pressure to participate in religious activity. *Lee v. Weisman*, 112 S.Ct. 2649, 2658 (1992).

In the present case, the coercion is equally or more substantial than that imposed upon the students and their parents in *Lee* who were compelled, at most, to listen with respect (but not to participate) while a brief prayer was offered at a public function. In contrast, in this case the public would be required to support financially James Zobrest's religious development by funding the interpreter's efforts. In addition, the School District Governing Board members, administrators and other school employees would be given the choice of acquiescing in the School District's involvement in James Zobrest's spiritual development or resigning their positions. The interpreter himself would be given the choice of immersing himself daily into a pervasively sectarian parochial atmosphere and participating in the associated religious activities, or foregoing public employment. These "choices," if imposed by the power of law, would be as abhorrent to the Establishment Clause as the choices faced by the spectators in *Lee v. Weisman*, 112 S.Ct. 2649 (1992).

The School District also would prevail in this case under an analysis that reviews the history and traditions

associated with the governmental activity being challenged. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (Chaplain's prayer in a state legislature is permissible under the Establishment Clause because it is supported by tradition and 200 years of unchallenged history).

During colonial times, and continuing until the 1820's and 1830's, public funding for any education, much less parochial education, was virtually nonexistent. See *Abington School District v. Schempp*, 374 U.S. 203, 238 n. 7 (1963). At the same time, the leaders of this then young country sought to remove the English colonial legacy of taxes imposed to support churches. See *Everson v. Board of Education*, 330 U.S. 1, 10-13 (1947); *Lee v. Weisman*, 112 S.Ct. 2649, 2673 (Souter, J., concurring). James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785), reproduced as an Appendix to *Everson v. Board of Education*, 330 U.S. 1, 63 (1947), was directed specifically at a proposed Virginia appropriation for "teachers of the Christian religion." The rise of Catholic parochial education in the mid-1800's produced nationwide sentiments against any public support for religious education. See Laycock, "Noncoercive" Support For Religion: Another False Claim About The Establishment Clause, 26 Valparaiso University Law Review 37, 52 (1991). The trend continues to this day, as evidenced by a long history of bitter litigation opposing public participation in and support of religious education, from *Everson* in 1947 to *Lee* in 1992. At the very least, our history reflects the absence of any tradition of government support for religious education; and in fact, historical aversion to public participation in religious education is well documented.

For the above reasons, the School District would prevail in this case regardless of whether it is analyzed using the *Lemon* test, an endorsement test, a noncoercion-proselytization test, or a historical traditions test. None allows the direct, ongoing involvement of the state in religious activities that the Zobrests demand here.

IV. THE SCHOOL DISTRICT IS NOT UNLAWFULLY INHIBITING RELIGIOUS PRACTICE

The Zobrests argue, for the first time, that the failure of the School District to provide to them the services of a sign language interpreter inhibits their ability to practice their religion in violation of the Establishment Clause. P.Br. at 23. In so arguing, they note that, without public funding, they must either bear the economic burden to hire an interpreter or send their child to a public school. P.Br. at 5. The Zobrests therefore conclude that they are being discriminated against on the basis of religion.

Initially, the School District notes that neither the above argument nor this case in general involves concerns that the Zobrests' right to free exercise of religion might be compromised. The Zobrests abandoned the free exercise claims that they previously had alleged against the School District. See Petition For Writ of Certiorari at 10, n. 9. Moreover, an Establishment Clause claim, based upon inhibition of religion or otherwise, was not raised by the Zobrests in either the District Court or the Court of Appeals. As such, their discrimination/inhibition argument should not be considered by this Court. *Youngberg v. Romeo*, 457 U.S. 307, 316 n. 19 (1982).

The Zobrests premise their discrimination/inhibition argument on the summary conclusion that, except for the School District's objection to the interpreter's involvement in religious activities, James otherwise would be "entitled" to receive the requested services under the IDEA. Contrary to the Zobrests' premature conclusion, however, the required applicability of the IDEA to the assistance demanded by the Zobrests was neither conceded by the School District¹⁷ nor adjudicated by the

¹⁷ In its answer filed in the District Court, the School District specifically denied that the IDEA requires it to provide a sign language interpreter as requested by the Zobrests. JA 56, paragraph 15. Moreover, the only stipulation on this issue was that the School District would provide the interpreter at any public high school. JA 88, paragraph 13. The United States, as *amicus curiae*, and the Zobrests, although less forcefully, point out that in a pleading filed by the School District opposing the Zobrests' request for preliminary injunctive relief, the School District stated that the interpreter's services would have to be provided "so long as [James] is educated in a non-parochial setting." The United States and the Zobrests make too much of this statement. This pleading, filed only three days after the amended complaint was filed in August of 1988, and prior to the School District's answer being filed, never expressly discusses the issue of private, nonparochial schooling. The two educational options being discussed by the District and the Zobrests at that time (and, in fact, throughout this case) were Salpointe Catholic High School and the various public schools in the Tucson area. The School District was very careful to enter into a later stipulation for the purposes of the cross-motions for summary judgment that stated only that the interpreter services were mandated in a public school setting. JA 88-89. In any event, this issue is purely one of law and the law has evolved since 1988 to clarify that the services at issue here would not need to be provided in each case involving a private school setting, whether or not parochial. See text, *infra* at 46.

lower courts in this case. To the contrary, so long as the necessary special education-related services are available to James at a public school, the School District is not required in his individual case to provide the services at a parochial or nonparochial private school he chooses. *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 188 (1991). The United States, in its *amicus* brief filed on behalf of the Zobrests, agrees that the IDEA does not establish an individual entitlement to services for students placed in private schools at their parents' option, but only requires each state to offer private school students generally, but not individually, equitable opportunities to participate in services being offered to public school students. Brief of the United States as *Amicus Curiae* at 13, 22-23. The United States, through the Department of Education, reached this same conclusion when addressing a fact situation identical to that here. See Department of Education Opinion Letter dated August 13, 1990, 16 EHRLR 1398 (1990), *quoted in Goodall, supra*, 930 F. 2d at 368.

There is no unconstitutional inhibition or discrimination when a school district refuses to provide a service available at a public school but not legally required to be provided in private schools, whether or not parochial.

Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her own spiritual development or that of his or her family.

Bowen v. Roy, 476 U.S. 693, 699 (1986) (emphasis in original). Stated in another manner:

The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them.

Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).¹⁸

In addition, the School District's decision to deny the services requested here is supported by a compelling interest in avoiding a violation of the First Amendment that would result from state participation in religious activity. If the application of a generally applicable criminal statute is not affected by the religious demands of individuals, *Employment Division v. Smith*, 494 U.S. 872 (1990), then surely the avoidance of a constitutional violation must fare equally well.

Similarly, the School District's position in this case is justified by a compelling interest in ensuring the strict separation of church and state enjoyed by Arizona residents as referenced in the Arizona Constitution. Article II, Section 12 of the Arizona Constitution provides in part that "no public money or property shall be appropriated for or applied to any religious worship, exercise or

¹⁸ The fallacy of the Zobrests' "inhibition/discrimination" argument also can be demonstrated with reference to public aid schemes considered by this Court. Just because government *may* provide free textbooks and bus transportation to private school parochial and nonparochial students, see *Board of Education v. Allen*, 392 U.S. 236 (1968), *Everson v. Board of Education*, 330 U.S. 1 (1947), does not mean that the state *must* supply these items to such students.

instruction, or the support of any religious establishment. . . ." An identically worded clause in the Washington State Constitution has been characterized by this Court and has been determined by the Washington Supreme Court to be far stricter than the prohibitions in the Establishment Clause of the First Amendment. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 489 (1986); *Witters v. State Commission for the Blind*, 771 P.2d 1119, 112 Wash.2d 363 (1989), cert. denied, 493 U.S. 850 (1989). In addition, Arizona Attorney General Opinion 188-072 (June 27, 1988), which addressed the Zobrests' demands made in this case, concluded that they would run afoul of the requirements of the Arizona Constitution. JA 94, paragraph 41; JA 9.

The School District either provided or offered to provide James Zobrest the educational opportunities to which he was entitled under the IDEA. Whether it voluntarily would have agreed to provide the services in a private school setting absent constitutional concerns is immaterial. In addition, the School District has done nothing to prevent James from following his religious beliefs. Rather, the School District merely has declined to require one of its employees to have day to day involvement in James' religious development. The Establishment Clause does not compel it to do otherwise.

CONCLUSION

Over twenty years ago, this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), referenced the three main evils

against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id.* at 612, quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). The governmental activities requested by the Zobrests in this case, however, would involve the state in precisely these prohibited activities. If the Establishment Clause stands for anything, it must stand for the principle that a school district may not be required or even permitted to use its tax supported resources to participate directly and physically in the inculcation of religious values to primary and secondary school students. See *Everson v. Board of Education*, 330 U.S. 1, 15 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa.") In this case, the Zobrests demand that an Arizona school district and its administrators, employees and taxpaying constituents be judicially compelled to conform to the Zobrests' religious desires by placing a public employee in a parochial classroom on a continuing basis to facilitate religious indoctrination. No precedent by this Court has ever permitted ongoing, hands-on interaction between government and religion of the type at issue in this case, much less required it. To require the Respondent to do so now would repudiate decades of firmly established precedent.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 92-94

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In The
Supreme Court of the United States
October Term, 1992

— ♦ —
LARRY ZOBREST, SANDRA ZOBREST,
husband and wife;
JAMES ZOBREST, a minor, by
LARRY and SANDRA ZOBREST, his parents,
Petitioners,
v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

— ♦ —
On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit
— ♦ —

REPLY BRIEF FOR PETITIONERS
— ♦ —

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ARGUMENT

The School District's bottom line is this: If a deaf child is to receive EHA on-site interpreter services which a local education agency agrees are necessary to his becoming educated, he and his parents must forego education at a religious school. The District's position, as given in its brief, is based upon (1) its false assumption that it has power, under the EHA, to deny needed interpreter services to any child on the premises of his or her private school, (2) its misconception of "primary effect advancing religion," (3) its misconception of "excessive entanglements," (4) its misrepresentations of positions taken by petitioners on material matters.

I. THE EHA DOES NOT GIVE LOCAL EDUCATIONAL AGENCIES POWER ARBITRARILY TO DENY NEEDED ON-SITE INTERPRETER SERVICES TO PRIVATE SCHOOL DEAF CHILDREN

For the first time, and at the level of this Court, the District states the position that, even if the Establishment Clause did not bar its providing interpreter services on the premises of a religious school, the EHA does not require it to provide on-site interpreter services at any private school even though, as here, the child's IEP required such services and only by receiving them at the site of his schooling, could the objectives of the Act be realized for him. (Br. Resp., 4, n. 4, 45, n. 17, 46.) Thus in spite of a ruling by this Court in favor of petitioners on the Establishment Clause issue, they would not be entitled to relief until a favorable outcome of yet more years

of litigation. In support of its contention, the School District says that its being required to furnish Jim an interpreter at his private school was "neither conceded by the School District nor adjudicated by the lower courts in this case." (*Id.* at 45-46.) This new position of the School District can only be described as a baseless effort suggesting Dickens' phrase in *Bleak House* of "wearying down the right":

1. The contention comes four and a half years late. The District appears not to recall that in 1988 it had issued an Individualized Education Program (IEP) for Jim in response to his parents' request for EHA classroom interpreter services at Salpointe. (See, A-128-134; Br. Opp. 2.) The IEP represented an acknowledgment of the District's belief that it had the obligation – but for the constitutional question – to provide him the on-premises service which his parents had requested.¹ The IEP is a local educational agency's determination, based on evaluation of the disabled child, that a program be afforded him (on which commitment his parents are entitled to rely).²

¹ As the IEP recited, "All parties agree that Jim Zobrest needs the services of a sign language interpreter. The issue of whether the District is required by state or federal law to pay for such services while Jim is a student at Salpointe Catholic High School is currently the subject of litigation in Federal District Court." (A-128. Emphasis supplied.) "The services" obviously meant services where he was being educated, not somewhere else. The "litigation" concerned the District's Establishment Clause objection.

² Special education, in order to constitute a free appropriate public education, must comport with the child's IEP. *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982). According to the

2. While, in view of the IEP's admission of Jim into the EHA program, it is irrelevant whether the issue of the District's Statutory obligation to provide EHA services on private school premises to Jim was adjudicated by the courts below, it is nevertheless true that the District took the unqualified position before the District Court that the EHA "requires it to provide . . . the services of a sign language interpreter, so long as James is educated in a non-parochial setting," (J.A. 34), that EHA "mandates the provision of interpreter services in non-parochial schools," (J.A. 35), that "James has at his disposal the services of an interpreter at any neighboring non-parochial high school he chooses to attend." (J.A. 37.) In its Opposition to Plaintiffs' Motion For Preliminary Injunction, at page 6, the District stated: "The District admits that the EHA requires it to provide for James, as part of a free appropriate public education, the services of a sign language interpreter, so long as James is educated in a non-parochial setting." (Emphasis supplied.) Asked, in interrogatories, for "the reasons" why the School District refused to provide the services at Salpointe, the School District listed solely the Establishment Clause in response (J.A. 60) and added "because such action would violate the first amendment to the United States Constitution." (Emphasis supplied in all the foregoing quotations.)³

U.S. Department of Education, "all services in the IEP must be provided in order for the agency to be in compliance with the Act." 34 C.F.R. Appendix C (Notice of Interpretation) at Question 45.

³ The School District (Br. Resp., 4, n. 4) says that it had "denied the allegation contained in Petitioners' Amended Complaint in this regard" (*i.e.*, in regard to whether the School

Before the Court of Appeals the School District stated that "it can and should be assumed that the School District would provide a sign language interpreter for James Zobrest not only at any public school, *but also at any private nonparochial school.*" (School District's Answering Brief in Court of Appeals, 6, n. 3. Emphasis supplied.) The School District reiterated this position on oral argument. (See taped transcript, Side 2, at 8th minute.) The Court of Appeals noted (A-4) without contradiction, that "if James attended either a public or a non-religious private school in Arizona," and (A-5, n.1) "if James' parents enrolled him in a non-sectarian private school or public school, the School District would be obliged to provide a sign language interpreter for him." Further the court pointed out that the district agreed that this was so. (*Ibid.*)

3. On September 27, 1988, the District Court ordered that counsel file, by March 27, 1989, "all dispositive motions." A copy of that order is appended to this brief. If the School District had believed that it was not required by EHA, or by the IEP issued thereunder, to provide on-premises service to Jim, the District would logically have sought dismissal on that ground, avoiding

District was required to furnish the services on his school's premises), citing J.A. 56, paragraph 15 of its answer. But that paragraph merely answers paragraphs 24, 25, 26 and 27 of the petitioners' complaint, not one of which relates to this question. While it is true that, in the stipulation of facts (J.A. 88-89, paras. 13 and 15), the School District says that Jim could receive the services at a public high school, it says nothing about the problem in point here - namely, whether he could also receive them at a private school.

involving itself in constitutional litigation on the Establishment Clause. It did not.

4. The District does not state why, if it was required to furnish interpreter services to make possible a deaf child's education in a public school, it was free to deny that service to such a child in a private school. Nor does it discuss the extensive provisions of EHA and the related regulations generally pertaining to helping children in private schools.⁴ Aside from the specific IEP issued by the District in this case, the latter require that program benefits for students enrolled in private schools be comparable in quality and scope for students enrolled in public schools. (34 C.F.R. §76.654.) They provide that, while a subgrantee may not use program funds to meet the needs of a private school, it "shall use program funds to meet the specific needs of children enrolled in private schools." (34 C.F.R. §76.658. Emphasis supplied.) Further, a subgrantee may use program funds to make public personnel available in private schools "to the extent necessary to provide equitable program benefits designed for children enrolled in a private school" where those benefits are not normally provided by the private school. (34 C.F.R. §76.659.)

In any event, the District suggested that it was *empowered* to afford the service on private school

⁴ See 20 U.S.C. §1413(a)(4)(a) and relevant regulations 34 C.F.R. §§76.651-76.660, 300.341(b)(2), 300.350-300.452. EHA §1401(a)(10), so defines "secondary school" as to include all private schools. And see *Tribble v. Montgomery County Board of Education*, ___ F.Supp. ___, 19 IDELR 192 (M.D. Alabama, July 28, 1992).

premises. (Br. Resp., 4, n. 4.) That is to say, but for its Establishment Clause problem, it was free, under the EHA, to have provided the service to Jim which its IEP had acknowledged to be most appropriate. The District found Jim to be eligible for interpreter services and needing them. But the concept of eligibility would be meaningless if, coupled with it, was not the obligation to help the child eligible. Where the interpreter's service is needed in order to afford the child the indispensable thing of education for his very future, it would be absurd to suggest that he or she could not get the service at the only place where the education happens – namely, his school's classroom. It is, after all, *education* which is the sole aim of the EHA.⁵

⁵ The District seriously misrepresents the position of the United States as *amicus curiae*, stating: "The United States, in its *amicus* brief, agrees that the IDEA [EHA] does not establish an individual entitlement for students placed in private schools at their parents' option, and only requires each state to offer private school students generally, but not individually, equitable opportunities to participate in services being offered to public school students." (Br. Resp., 46. Emphasis supplied.) By contrast, in place of those italicized words, what the United States did say (significantly) was this: "... it [EHA] does require the States to offer those students an equitable opportunity to participate in the services made available with federal funds to all students, and draws no distinction between students in sectarian private schools and those in secular private schools." (Br. United States, 13.) As has been seen, the "offer" (IEP) had *already* been made to Jim.

II. THE SCHOOL DISTRICT MISAPPLIES THIS COURT'S TEACHINGS ON "PRIMARY EFFECT ADVANCING RELIGION"

Here is what the District states as its reason for saying that affording Jim a sign language interpreter would have had an unconstitutional "primary effect advancing religion":

... because the employee at issue here would participate in the transmission of religious concepts, the interpreter's services become directly related to the primary, religious oriented educational goals of both Salpointe and the Zobrests. The interpreter's activities *thus* have a primary effect of promoting religion.

Br. Resp., 7.⁶ (Emphasis supplied.)

It is therefore the relationship of the interpreter's services to the "religious educational goals" of both Salpointe and the three Zobrests which the District defines as giving rise to a "primary effect advancing religion."

(a) *Salpointe's goals*. It is important, then, to look to the first-named vehicle of "primary effect," namely, Salpointe. The District, quite sensibly, at no point claims that Salpointe would have been a financial or material beneficiary of the interpreter services rendered Jim. Salpointe is not a party to this litigation. It has had no program for deaf students; hence the assistance to Jim would not have relieved it of any burden which it had been carrying. The

⁶ The respondent repeats the same point at page 16 of its brief. It also admits that not even a *public* high school would have been available to Jim within the District. (Br. Resp., 3, n. 3.)

District limits Salpointe's interest in this case to but a single thing, its "religious oriented goals." So far as Salpointe is concerned, therefore, the EHA aid to Jim would have had a primary effect advancing religion, solely because it would have been "directly related," not to Salpointe's income, properties, or other material benefits, but solely because – in some fashion – it "related" to Salpointe's "goals." While the District is correct in stating that Salpointe has indeed religious goals, "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Board of Education v. Allen*, 396 U.S. 236, 245 (1968). The reader of the District's brief is left uninformed as to how giving Jim an interpreter's service is "related" to Salpointe's achieving its religious goals, or why, if it also aids (as indeed it does) Salpointe to provide general, state-approved secular education, it has a primary effect advancing religion.

To shore up its "primary effect" contention in respect to Salpointe, the District, without explanation, shifts its argument to the many Supreme Court cases in which the issue was *financial and material aid to religious institutions* (*Everson*, *Allen*, *Lemon*, *Nyquist*, *Regan*, *Kendrick*, *Aguilar*, *Grand Rapids*, *Wolman*, *Witters*, etc.). To make its argument stick, based on the "aid" cases, the District must first establish that such institutional aid is an issue in the present case, as contrasted with the notion of a tenuous, unexplained "relationship" to an institution's assumed "goal," or end, as in the case of Salpointe.

(b) *Larry and Sandra Zobrest*. The District argues that providing Jim an EHA interpreter at the site of his education also has a primary effect advancing religion because it is "directly related" to "the primary, religious oriented

educational goals of . . . the Zobrests." The record (J.A. 89) states that Jim's parents "desire him to be educated, at the high school level, during his adolescence, in a Roman Catholic educational institution." It also states that there is no doctrine or rule of the Catholic Church that required that Jim attend a Catholic School. (*Ibid.*) The record discloses no general "religious oriented educational goals" of Larry Zobrest or of Sandra Zobrest and nothing beyond the fact that, for reasons of their religious conscience (and in order to fit Jim to survive in the world), they wanted their son to attend Salpointe. That mere fact of their having those goals for Jim is needlessly and wrongly parlayed by the District into the claim that giving Jim the interpreter services would have violated the Establishment Clause.

(c) *Jim Zobrest*. The record is silent as to any goals of any sort which he may have had. It may be assumed that he wanted help indispensable to his getting an education. But to state that, between ages 14 and 18, he was preoccupied with "religious oriented educational goals," though marvelously imaginary, does nothing but burden this litigation with the irrelevant.

For two reasons the District's entire "primary effect" argument must fail. First, whatever the interpreter's effect may be in respect to conveying religion to Jim, it is only one of multiple effects – a point made by petitioners (Br. Pet., 9-11) to which the District has not responded. Second, the only "primary effect" asserted by the District pertains to the "goals" of Salpointe and of the three Zobrests. Thus, while it is true, as the District claims, that the interpreter, as a public employee, would function in a religious school classroom, the District affords nothing to

show that his relationship (whatever that may be) to the goals of Salpointe, or of the Zobrests, has a *primary* effect advancing anybody's religion – as contrasted, for example, with the effect of aiding a severely disabled child to become educated. This Court has made it clear that the mere presence of a religious effect does not render that effect "primary." See, e.g., *Mueller v. Allen*, 463 U.S. 388, 393 (1983).

(d) *The interpreter.* The District builds its "primary effect" (as well as its "excessive entanglements") arguments on misstatements of the interpreter's function. Repeatedly, the District presses the point that, since by the interpreter, government "participates" in conveying religious messages and practices, his activity has the unconstitutional "primary effect." (Br. Resp., 11, 19.) So with the District's warning concerning the "potential risks" seen in *Aguilar*, that public employees in religious schools may be induced to "teach" religious values. (Br. Resp., 13.) "Participate" and "teach" are employed by the District in substitution for the one word that is accurate: *interpret*. The interpreter does *not* "participate" or "teach" according to the shifted meaning. These and other adroit shifts in meaning are obviously intended to bring this case within the purview of the institutional aid cases. See, for example, repeated citations to *Meek*. (Br. Resp., *passim*.) To this end, the District transmogrifies the interpreter into a member of an "instructional team." (Br. Resp., 10, 15, 32.) The intended effect is (again) to convey the impression that government, in providing an interpreter, would then be supplying a religious school part of a teaching unit. Which part? The respondent takes us back to Square One: the interpreter – whose job is to do

nothing but interpret. It is not easy to see how the "instructional team" idea aids the District's "primary effect" argument.

The interpreter's role is also used as the springboard for extreme and utterly speculative predictions of situations that are sure to occur if this Court rules in favor of petitioners. For example: if the Establishment Clause is held not to bar providing interpreter's services to Jim, then an atheist publicly paid teacher could lead a class in prayer (Br. Resp., 24-25), or public funds could be used to subsidize a religious print shop at Salpointe (*id.*, 25), or publicly paid "readers" could be placed in religious schools to read items to students selected by the principal. (*Id.* at 25.) While the District, with great effect, demolishes these straw men, they remain straw men. In the praying atheist example, the atheist is a teacher and thus one in authority; in the print shop example is a direct subsidy to a religious institution, not a publicly funded service to a child. The "readers" fable is analogous but for one thing: it lacks an interpreter to communicate on behalf of the "readers" (the "readers" obviously being in a role of teaching authority who are actually delivering the educational material to the entire class and are not simply the means whereby a deaf child can learn).

These examples are utterly speculative and not likely to occur in the real world of education and should not be heard to provide leverage for the working of an injustice to special needs children who *require* extraordinary measures. In terms of "primary effect," each program would have to be judged on its own facts.

(e) "Coercion" and "endorsement". The District contends that its Governing Board members, District employees and local taxpayers "are faced with pressure, attempted to be exerted by the Zobrests through the force of federal laws to participate in James' religious upbringing." (Br. Resp., 39-40.) To this list it adds "administrators." (*Id.* at 42.) None of these, except the District, are complainants in this case, having party status. The District itself has not previously complained of any form of coercion. The Zobrests have certainly engaged in no "coercion," having done no more than request (the District's constant translation of this is "demand") that Jim be provided the help of an interpreter. To get itself into a "coerced" role of constitutional dimension, the District unblushingly tells the Court that "[t]he compulsion here is just as real as in *Lee*" (*id.* at 40) indeed, "equally or more substantial" than that. (*Id.* at 42.) In other words, the supplying or a sign language interpreter to Jim would have the same (or worse) effect on the Governing Board members, employees, local taxpayers and administrators as the "religious conformance compelled by the State," with its "embarrassment and intrusion" (*Lee v. Weisman*, 112 S.Ct. 2649, 2658), had on Daniel and Deborah Weisman in *Lee*. This amazing contention bespeaks its own extravagance.

Similar is the District's unsupported assertion that supplying the interpreter to Jim would be seen by "reasonable non-believers" as endorsement of religious orthodoxy. (Br. Resp., 39.)

III. THE SCHOOL DISTRICT MISAPPLIES THIS COURT'S TEACHINGS ON "EXCESSIVE ENTANGLEMENTS"

The District alleges that the providing of the interpreter for Jim would have created "excessive entanglements between church and state." (Br. Resp., 18-21.) If it be accepted, *arguendo*, that Salpointe is "church," the District discloses no relationship between the District and Salpointe that can remotely be considered an "excessive entanglement." To prop up its entanglement charge, the District is forced (a) to distort the teachings of *Walz v. Tax Commission*, 397 U.S. 664 (1970), as well as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), (b) to blow up, out of all proportion, the few and minimal relationships which the District would have had with the interpreter.

The District, to get itself under the cover of *Walz*, repeatedly employs *Walz's* phrase, a "continuing day-to-day relationship," to describe the contact between the District and the interpreter – and thus to establish "excessive entanglements." (Br. Resp., 18, 19.) Attempting to make that phrase fit its entanglement claim, the District nevertheless fails to present the Court with the full text in which the phrase appeared. The *Walz* Court was in fact warning simply against *those sorts* of day-to-day relationships which arise from the imposition, on religious entities, of "governmental evaluation and standards."⁷

⁷ The actual text is this:

To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth

The District chooses to ignore what this Court meant when it spoke of "excessive entanglements." Concerning that doctrine, the Court stated that "[t]he objective is to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." (*Lemon*, *supra*, at 614.) "Some relationship," said the Court, "between government and religious organizations is inevitable." (*Ibid.*) It was against this background that the Court, in *Lemon*, voided programs adopted by Rhode Island and Pennsylvania, which necessitated, in the eye of the Court (quoting *Walz*), "'sustained and detailed administrative relationships for enforcement of statutory or administrative standards'" (*Lemon*, *supra*, at 621), or "[a] comprehensive, discriminating, and continuing state surveillance" to ensure that the "pervasive restrictions" found in those states' statutes were obeyed. (*Id.* at 619.)

The District delves to buttress its claim that providing the interpreter would somehow give the "appearance of [governmental] endorsement" of religion, stating: "The sign language interpreter would . . . be one of the few people if not the only person there with whom James could communicate directly and with ease." (Br. Resp., 27.) While this stereotyping of deaf persons is contradicted by the mainstreaming principle (see Brief Amicus

of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Walz, *supra*, at 674. (Emphasis supplied.)

Curiae of Alexander Graham Bell Association for the Deaf, 5), it is also contradicted by the record, wherein the District itself testifies to Jim's direct communications with fellow students and teachers, *bypassing* the interpreter. (A-134.)

The District's out-of-scale magnification of the District-interpreter relationships (which, even in the District's brief, are both few and speculative) rated but a footnote in the Court of Appeals opinion (A-13, n. 5). But these were treated extensively in Judge Tang's realistic and common-sense dissent. (A-27 - A-32).

IV. THE SCHOOL DISTRICT HAS MISREPRESENTED POSITIONS TAKEN BY PETITIONERS ON MATERIAL MATTERS

That the Court may have a clear picture of this case as it comes before it, petitioners are required to point to erroneous characterizations by the District, of their positions on matters of material significance:

1. That the Zobrests claimed that "interpreter services are . . . legally mandated by the IDEA [EHA] for every student who voluntarily attends a private school . . ." (Br. Resp., 4, n. 4.) *In fact*: The Zobrests, as the record shows, made *no* such claim. The pages of their brief, to which the District directs the Court's attention, state simply that they believed that "James was statutorily qualified to receive the EHA service which he and his parents had requested." (Br. Pet., 7-8.)

2. That "importantly, the Zobrests chose Salpointe over a public school *solely* to further James Zobrest's

religious development. J.A. 89, paragraph 16." (Br. Resp., 18.) *In fact*: That paragraph reads: "James Zobrest is enrolled at Salpointe for the particular reason that his parents Larry and Sandra Zobrest, desire him to be educated, at the high school level, during his adolescence, in a Roman Catholic educational institution." It is obvious that they desired, for his very survival, the general, as well as religious, education offered him at Salpointe. (See Br. Pet., 9-11.)

3. That the Zobrests, at page 17 of their brief, "suggest that, like the prescribed diagnostic services in *Wolman v. Walter*, 433 U.S. 229 (1977), there is little or no danger of government participation in the religious function of Salpointe." (Br. Resp., 19.) *In fact*: Neither at page 17 of their brief, nor anywhere else in it, can any such statement be found.

4. That "the Zobrests then suggest that the sign language interpreter's code of ethics precludes him from participating in religious instruction. *Id.* [Brief For Petitioner, 17.] The Zobrests are wrong." (Br. Resp., 19.) *In fact*: Nowhere in their brief do petitioners make any such claim. What they say at the cited page 17 is this: "His [the interpreter's] function is mechanical, and the messages he communicates, *while partly religious*, are by and large the same messages that he would communicate in any secular school." (Br. Pet. 17-18. Emphasis supplied.) Indeed petitioners stipulated that the interpreter handles *all* communications, including those "of a religious nature." J.A. 93. Petitioners' brief at page 22 states: "That the interpreter conveys religious messages is a given in this case."

5. That " . . . the Zobrests argue [at pages 9-11 of their brief] that the effect of assisting religious practice and education somehow is diluted because the interpreter communicates mostly secular instruction . . . " (Br. Resp., 22.) But petitioners contradict themselves by admitting that one effect of the interpreter's service "would be to further James' religious development." (Br. Resp., 22, n. 10.) *In fact*: Petitioners have never contended that Jim's religious education at Salpointe is "diluted." They have not merely admitted, but emphasized, that Jim's attendance at Salpointe is in part to further his religious development. The District seemingly chooses to miscast the petitioners' position in order that it may demolish the straw man it erects.

6. That the Zobrests "cannot in good faith claim [at page 19 of their brief] that this case involves no more than the single sign language interpreter at Salpointe." (Br. Resp., 29, n. 13.) *In fact*: At page 19 of their brief the petitioners merely state that their case for James is readily distinguishable from the *Wolman* program which would have subsidized a parochial school system "as a whole." (Br. Pet., 19.)

CONCLUSION

The School District and its supporting *amici* warn the Court that reversal in this case would spell catastrophe to the principle of church-state separation. Focused singularly on the fact that a *religious* school would have been the site of the interpreter's aid to a deaf boy, they ignore the boy, his needs, his parents' liberty to choose that

school - and the justly inclusive purposes of the EHA. The petitioners present no challenge to *Lemon*; but the contentions of the District and its supporters have the inevitable effect of challenging *Everson*, *Allen*, *Mueller* and *Witters*. If the latter are successful, a fateful step toward a secularist legal regime will have resulted.

Justice Goldberg, three decades ago, noted that devotion to the principles of religious liberty sometimes "presents no easy course" and calls for a role of governmental neutrality. He added, in words precisely relevant to this case:

But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with religion which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to religion. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Goldberg, J., joined by Harlan, J., concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203, 305-306 (1963).

For the foregoing reasons, in addition to the reasons stated in Brief For Petitioners, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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App. 1

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

(CIVIL MINUTES - GENERAL)

Civil Case No.: CIV-88-516-TUC-RMB

Date: Sept. 27, 1988

Title: LARRY ZOBREST vs. CATALINA FOOTHILLS

SCHOOL DISTRICT

(Filed Sept. 30, 1988)

HONORABLE RICHARD M. BILBY

Proceedings:

 Open court Chambers x Other

STATUS CONFERENCE BEFORE LAW CLERK:

IT IS ORDERED:

1. Counsel shall submit to the Court settlement status reports on October 10, 1988, and February 10, 1989.
2. Counsel shall exchange and file with the Court a copy of their respective witness lists no later than February 13, 1989.
3. All discovery shall be completed and dispositive motions filed by March 27, 1989.

App. 2

4. Counsel shall comply with Local Rule 42 by filing their joint proposed pretrial order by 5:00 p.m., April 27, 1989

____ copies issued to:

/s/ Berning, Richardson, RMB

No. 92-94

Supreme Court, U.S.
FILED

NOV 19 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, ET AL., PETITIONERS

v.

CATALINA FOOTHILLS SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Establishment Clause of the First Amendment prevents a government from providing a sign-language interpreter to a deaf child in a sectarian high school as part of a general program providing interpreters to similarly handicapped children in all schools.

2. Whether the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. III 1991), or regulations promulgated under that Act, prohibit local authorities from using funds granted under the Act to provide a sign-language interpreter to a deaf child in a sectarian high school.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-94

LARRY ZOBREST, ET AL., PETITIONERS

v.

CATALINA FOOTHILLS SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The principal question in this case is whether the Establishment Clause permits a government authority to provide a sign-language interpreter to a deaf child in a sectarian high school as part of a general program providing interpreters to similarly handicapped children in all schools. Congress's passage of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. III 1991) (IDEA), reflects Congress's determination that "State and local educational agencies have a responsibility to provide education for all children with disabilities,"

Section 1400(b)(8) (Supp. III 1991), and that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law," Section 1400(b)(9) (Supp. III 1991). Accordingly, the United States has a significant interest in defending the constitutionality of the program challenged in this case.

Also, the Department of Education administers the IDEA program challenged in this case, see 20 U.S.C. 1402, and has promulgated regulations that implement the IDEA. See 34 C.F.R. Pts. 300-338. Similarly, the Department of Education provides remedial educational services to educationally deprived children in low-income areas attending private schools under Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 2701 *et seq.* (1988 & Supp. III 1991). The United States has a substantial interest in ensuring that the Court's disposition of this case is informed by the Department of Education's understanding of those programs.

The United States has participated as a party or amicus curiae in numerous cases arising under the Establishment Clause. See, *e.g.*, *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Aguilar v. Felton*, 473 U.S. 402 (1985); *School District v. Ball*, 473 U.S. 373 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Establishment Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion."

2. 20 U.S.C. 1400 and 1412-1414 (1988 & Supp. III 1991) are reprinted in an Appendix, *infra*, 1a-44a.

3. 34 C.F.R. 76.1, 76.532, 76.650-76.662, and 300.400-300.452 are reprinted in an Appendix, *infra*, 45a-55a.

4. The Special Education for Exceptional Children Act, §§ 15-761 *et seq.*, Ariz. Rev. Stat. Ann. (West 1991), is reprinted at Pet. App. A106-A127.

STATEMENT

1. When Congress enacted the Education of the Handicapped Act in 1970 (now known as the Individuals with Disabilities Education Act (IDEA)), see 20 U.S.C. 1400(a) (Supp. III 1991), it found that there were "more than eight million handicapped children in the United States" and that "more than half of the handicapped children in the United States d[id] not receive appropriate educational services which would enable them to have full equality of opportunity." Pub. L. No. 91-230, § 601, 84 Stat. 175, codified as amended at 20 U.S.C. 1400(b)(1) and (3) (Supp. III 1991). Recognizing that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law," Section 1400(b)(9) (Supp. III 1991), Congress has provided in Subchapter II of the IDEA for a program of federal grants to aid state and local authorities in providing educational assistance for children with

disabilities. See 20 U.S.C. 1411-1420 (1988 & Supp. III 1991).

Those grants, together with other federal grants the Department of Education administers to assist children with disabilities,¹ currently provide more than \$2 billion each year in assistance to States and local school districts to assist those children. See U.S. Dep't of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities* A-207 (Table AG1) (1992) (Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act) [hereinafter *1992 IDEA Report*].² During the 1990-1991 school year, those programs served more than 4.3 million children, of whom about 60,000 were identified as children primarily disabled because of a hearing impairment. *1992 IDEA Report*, at 7 (Table 1.3).

The fundamental requirement for obtaining a grant under the IDEA is that the State make available "a free appropriate public education for all children with disabilities" in the State, 20 U.S.C. 1412(2)(B) (Supp. III 1991). But the IDEA's purposes are not limited to children in public schools. To the contrary, Section 1400(c) (Supp. III 1991) states that the purpose of the IDEA is to "assure that *all* children with disabilities have available * * *

¹ The Department provides grants for three- to five-year-olds with disabilities under the Preschool Grants Program, 20 U.S.C. 1419 (1988 & Supp. III 1991), and operates a special program for children with disabilities in state-operated or supported institutions as part of the larger program for educationally deprived children under the ESEA, see 20 U.S.C. 2791 *et seq.* (1988 & Supp. III 1991).

² We have lodged a copy of the *1992 IDEA Report* with the Court and provided copies to counsel for the parties.

a free appropriate public education," and "to assist States and localities to provide for the education of *all* children with disabilities" (emphasis added)." Section 1413(a)(4) (1988 & Supp. III 1991) directly addresses the State's obligations with respect to children in private schools. If school authorities have selected the private school as the means of providing a "free appropriate public education" to the child, Section 1413(a)(4)(B) (Supp. III 1991) requires the State to provide the appropriate services in all cases "at no cost to * * * parents or guardian." With respect to children placed by their parents in private schools after rejecting an appropriate public school placement, the public agency must provide for participation of such children in special education or related services only "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools." Section 1413(a)(4)(A) (Supp. III 1991).

The Secretary of Education has promulgated regulations implementing the grant program established by the IDEA. See 34 C.F.R. Pt. 300. Section 300.403(a) provides that when children with disabilities are placed in a private school by their parents' choice "the public agency is not required by this part to pay for the child's education at the private school or facility"; instead the agency is required to "make services available to the child as provided under §§ 300.450-300.452." Section 300.452, in turn, provides that the agency "shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency." The meaning of this requirement is clarified by the provisions of 34 C.F.R. 76.651-76.662, which establish general

regulations for participation by private school students in the various grant programs administered by the Department of Education.³ Those regulations require the agency to "provide students enrolled in private schools with a genuine opportunity for equitable participation [in the programs offered by the agency to other students]." Section 76.651(a)(1).⁴ Benefits provided to students in private schools must "be comparable in quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools." Section 76.654(a). Where "necessary to provide equitable program benefits" that are "not normally provided by the private school," the agency "may use program funds to make public personnel available" in the private school's facilities. Section 76.659.⁵

Finally, the regulations do not draw a distinction in eligibility between students in private schools that

³ That portion of Part 76 of 34 C.F.R. is made directly applicable to IDEA grants by 34 C.F.R. 300.451(b).

⁴ The Department of Education has advised us that programs funded under the IDEA during the 1989-1990 school year assisted over 43,000 children placed in private schools by their parents. Although the Department does not collect data on the proportion of those students who attend sectarian private schools, it has advised us that about 80% of the private schools in this country are sectarian.

⁵ Funds granted under the program may not be used "to finance the existing level of instruction in a private school or to otherwise benefit the private school." Section 76.658(a). Rather, funds must be used "to meet the specific needs of students enrolled in private schools." Section 76.658(b); see also Section 76.662 (prohibiting use of program funds "for the construction of private school facilities").

are sectarian and those in private schools that are not sectarian. To ensure that grants for students in sectarian schools are not used for purposes that violate the Establishment Clause of the First Amendment, 34 C.F.R. 76.532 prohibits the use of federal funds to pay for "[r]eligious worship, instruction, or proselytization," Section 76.532(a)(1),⁶ or for activities of schools of divinity, Section 76.532(a)(4).

2. Petitioner James Zobrest is profoundly deaf. Pet. App. A4; J.A. 87. Accordingly, he requires the services of a sign-language interpreter in order to obtain the benefit of normal classroom instruction. J.A. 88. Before sixth grade, he attended a school for the deaf. Pet. App. A128; J.A. 88. He attended grades six through eight in a public school operated by respondent; respondent provided an interpreter who accompanied him to all of his classes. Pet. App. A128; J.A. 88. For religious reasons, his parents, petitioners Larry and Sandra Zobrest, who are Roman Catholics, enrolled James for the ninth grade in the Salpointe Catholic High School, a sectarian institution operated by the Carmelite Order of the Roman Catholic Church. Pet. App. A5; J.A. 89-90. When petitioners asked respondent to provide an interpreter to accompany James to his classes at Salpointe, respondent referred the matter to the Pima County Attorney, who concluded that it would violate the Establishment Clause to provide an interpreter on Salpointe's premises. J.A. 10-18. In June 1988, the

⁶ See also Section 76.532(a)(2) and (3) (prohibiting the use of federal grants to pay for "[e]quipment or supplies to be used for any of the activities specified in [Section 76.532(a)(1)]" or for "[c]onstruction, remodeling, repair, operation, or maintenance of any facility * * * to be used for any of the activities specified in [Section 76.532(a)(1)]").

Arizona Attorney General concurred in this opinion. Pet. App. A137.

3. Petitioners then instituted this action in the United States District Court for the District of Arizona, arguing that the IDEA and the Free Exercise Clause of the First Amendment require respondent to provide an interpreter, and that the Establishment Clause does not bar that relief. J.A. 19-26.⁷ In response to petitioners' request for a preliminary injunction, respondent "admit[ted] that the [IDEA] requires it to provide for [petitioner] * * * the services of a sign language interpreter, so long as [petitioner] is educated in a non-parochial setting," J.A. 34, but argued that the Establishment Clause prohibited it from providing an interpreter in a parochial setting, J.A. 33-40. On August 15, 1988, the district court denied petitioners' request for a preliminary injunction, accepting respondent's Establishment Clause argument and explaining that it found "no likelihood of success on the merits." J.A. 52-53. On July 20, 1989, the district court granted summary judgment for respondent. Pet. App. A35. The court stated that "the interpreter would act as a conduit for the religious inculcation of [petitioner]—thereby, pro-

⁷ The district court had jurisdiction over petitioners' action under 20 U.S.C. 1415(e) (4) (A), which grants the district court authority over actions brought to resolve disputes over the appropriate services to be provided to handicapped children under the IDEA. Although respondents initially contended that the action should be dismissed based on petitioners' failure to exhaust administrative remedies, see J.A. 45-51, the parties eventually agreed that exhaustion of administrative remedies was not required because exhaustion would be futile. See J.A. 94-95. Because respondents conceded the point in the court of appeals, see Pet. App. A6 n.2, it is not before the Court.

moting [petitioner's] religious development at government expense." *Ibid.*

4. A divided panel of the court of appeals affirmed (Pet. App. A1-A34), applying the three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). First, the court concluded that the statute passed the first prong, because "Congress made clear its secular purpose" in the introductory portion of the statute: "to assist States and Localities to provide for the education of all handicapped children." Pet. App. A8 (quoting 20 U.S.C. 1400(c) (1988)).

The court then turned to the second prong, whether the primary effect of the statute advances religion. Pet. App. A9-A13. The court concluded that the statute, as applied in this case, fails that prong, reasoning that the program creates a "symbolic union" of the type found unacceptable in *School District v. Ball*, 473 U.S. 373, 392 (1985). The court reasoned that the requested interpreter would attend classes at Salpointe that would involve religious matters and thus "would be the instrumentality conveying the religious message and experience." Pet. App. A10. In the court's view, "[b]y placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a 'joint sponsor' of the school's activities." *Ibid.*

The court distinguished *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986)—cases in which this Court upheld programs that made governmental benefits available neutrally to classes defined without reference to religion, even in cases where religious entities benefited indirectly—as cases in which the government was not "required to place its own employee in the sectarian school." Pet. App.

A11. The court also rejected petitioners' claim that the secular content of the interpreter's services would be readily ascertainable, relying on the parties' concession that "the interpreter would be required to act in a school environment in which the two functions of secular education and advancement of religious values or beliefs are inextricably intertwined." Pet. App. A12-A13 (internal quotation marks omitted).⁸

Judge Tang dissented. Pet. App. A16-A34. He concluded that the statute was constitutional because of his view that "similar general educational welfare programs have passed constitutional muster" in this Court's decisions in *Witters* and *Mueller*. Pet. App. A19. He also rejected the majority's reliance on *Ball*, explaining that "[g]eneral welfare programs neutrally available to all children, in both public and private schools, do not suffer the same constitutional disability [as programs limited to private schools] because their benefits diffuse over the entire population." Pet. App. A21. Accordingly, Judge Tang would have reversed the district court.⁹

⁸ The court also rejected petitioners' Free Exercise Clause claim. Pet. App. A13-A15. Although the court agreed that denial of an interpreter would "plac[e] a burden on an individual's free exercise rights," it found that burden acceptable in light of what it viewed as "a compelling interest in ensuring that the Establishment Clause is not violated." Pet. App. A14. Petitioners have not challenged the Free Exercise Clause holding in this Court. Pet. 10 n.9.

⁹ During the lengthy pendency of petitioners' case before the Ninth Circuit panel (more than two years), petitioner James pursued his high school studies; he graduated on May 16, 1992, a few weeks after the panel's decision. Pet. 4. The case nevertheless presents a continuing controversy because petitioners still seek reimbursement for the cost of the inter-

SUMMARY OF ARGUMENT

1. Under this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a statute does not violate the Establishment Clause if it has a secular purpose, its primary effect does not advance religion, and it does not lead to excessive entanglement with religion. *Id.* at 612-613. The program challenged in this case passes that test.

a. The statute has a secular purpose, set forth in 20 U.S.C. 1400(c) (Supp. III 1991): "to assist States and localities to provide for the education of all children with disabilities." Neither the court of appeals nor respondent has identified any reason to doubt the sufficiency or validity of that purpose. Accordingly, the statute passes the first prong. Compare *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion of O'Connor, J.) (Court "is normally deferential to a [legislative] articulation of a secular purpose").

b. The primary effect of the statute neither advances nor inhibits religion. The challenged program is part of a general government program that dispenses benefits neutrally, without regard to whether the beneficiaries support religion, are opposed to religion, or express no opinion. This Court regularly has rejected claims that such programs have a primary effect that advances religion simply because some religious organizations might receive an indirect benefit. Instead, it has concluded that the

preter they retained. See *ibid.*; J.A. 42 (respondent's acknowledgment that petitioners "may be entitled to reimbursement from [respondent] for the additional cost of an interpreter incurred"). The record suggests that the interpreter cost petitioners approximately \$7,000 each year. J.A. 65.

primary effect is the secular effect that was the goal of the legislature. For example, in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court rejected an Establishment Clause challenge to a program allowing the use of government funds to defray educational expenses of a blind student, in a case where the student used the funds to pursue theological studies at a pervasively sectarian institution. The Court should reach the same result here.

The court of appeals justified a contrary result by relying on this Court's decisions in *School District v. Ball*, 473 U.S. 373 (1985), and *Meek v. Pittenger*, 421 U.S. 349 (1975). Those cases, however, are not dispositive. Those cases involved the use of public funds to pay teachers who would teach classes in classrooms in sectarian schools. In those cases, the Court concluded that there was a substantial risk that the teaching of the publicly funded employees would be affected by the sectarian environment, which would result in the public funds being used to convey sectarian ideology. But petitioners are not asking for a publicly funded teacher; they are asking for an interpreter, who will perform an objective task not likely to be affected by the sectarian atmosphere in which he works; as a practical matter, his function is indistinguishable from that of a highly developed hearing aid. Because the interpreter is not himself teaching the child anything, the fact that his work assists the student in understanding the sectarian message of the student's teachers does not create an establishment of religion. In sum, the primary effect of the interpreter is to aid the student in understanding his teachers. That is not an effect that impermissibly advances religion.

e. Finally, the case does not pose an unacceptable risk of an excessive entanglement with religion. Because the interpreter is merely a technical facilitator of communications, there is no need for the State to monitor the interpreter's daily activities. Hence, the State's monitoring generally would be limited to the simple tasks of arranging for the interpreter's presence at the school, and assessing his qualifications for his job and his adequacy in performing that job, tasks that present no risk of interference with sectarian authorities at the school chosen by petitioners.

At bottom, the analysis of the court of appeals is inconsistent with this Court's view that the "Establishment Clause does not license government to treat religion and those who teach or practice it * * * as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)). Accordingly, the judgment of the court of appeals should be reversed.

2. Neither the IDEA nor regulations promulgated under it prohibit the use of IDEA grants to provide interpreters in sectarian high schools. Although the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option, it does require the States to offer those students an equitable opportunity to participate in the services made available with federal funds to all students, and draws no distinction between students in sectarian private schools and those in secular private schools. Accordingly, nothing in the IDEA or its regulations undermines petitioners' arguments under the Establishment Clause.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT NEUTRAL GOVERNMENT PROGRAMS DESIGNED TO AID INDIVIDUALS THAT INCIDENTALLY MAY BENEFIT BOTH SECTARIAN AND NONSECTARIAN INSTITUTIONS

Under this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a statute does not violate the Establishment Clause of the First Amendment if it passes each prong of a three-pronged test: (1) it "ha[s] a secular legislative purpose"; (2) "its principal or primary effect * * * neither advances nor inhibits religion"; and (3) it does "not foster an excessive entanglement with religion." *Id.* at 612-613 (internal quotation marks omitted). Although a majority of the members of this Court have criticized the tripartite test articulated by *Lemon*,¹⁰ the

¹⁰ *E.g.*, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) ("Substantial revision of our Establishment Clause doctrine may be in order."); *Edwards v. Aguillard*, 482 U.S. 573, 636 (1987) (Scalia, J., dissenting) ("pessimistic evaluation * * * of the totality of *Lemon* is particularly applicable to the 'purpose' prong"); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (*Lemon* test is "a constitutional theory [that] has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results"); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting) (expressing "doubts about the entanglement test" of *Lemon*); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring in the judgment) ("I am no more reconciled to *Lemon I* now than I was when it was decided. * * * The threefold test of *Lemon I* imposes unnecessary [and] superfluous tests for establishing [a First Amendment violation].").

Court has not seen fit thus far to revisit that test.¹¹ In any event, because the IDEA passes *Lemon*'s three-pronged test, it does not violate this Court's *Lemon*-based understanding of the Establishment Clause.

A. The IDEA Has a Secular Purpose: To Assist in the Education of Children with Disabilities

In this case, as in other cases involving governmental assistance programs, "[l]ittle time need be spent on the question" of whether the IDEA has a secular purpose, *Mueller v. Allen*, 463 U.S. 388, 394 (1983). The statute sets forth its secular purpose with clarity. In 20 U.S.C. 1400(b) (1988 & Supp. III 1991), Congress set forth nine findings explaining its reasons for enacting the statute. The most relevant to this case are the eighth and ninth findings, which declare that "State and local educational agencies have a responsibility to provide education for all children with disabilities," 20 U.S.C. 1400 (b)(8) (Supp. III 1991), and that "it is in the national interest that the Federal Government assist

¹¹ The Court in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), declined our suggestion that it revisit the applicability of *Lemon* in the context of civic acknowledgment of religion, viewing the case as an instance of "state-sponsored and state-directed religious exercise in a public school," a view that led directly to the result the Court reached without the need for consideration of *Lemon*'s tripartite test. 112 S. Ct. at 2655. In our view, a straightforward application of *Lemon* does not draw seriously into question the service that petitioner was denied. If, however, the court of appeals' reasoning—or that of the district court—is deemed by this Court to be faithful to *Lemon*'s strictures, then reexamination of *Lemon*'s approach to Establishment Clause analysis would be in order.

State and local efforts to provide programs to meet the educational needs of children with disabilities," Section 1400(b)(9) (Supp. III 1991). Similarly, the next subsection, Section 1400(c) (Supp. III 1991), headed "Purpose," lists several purposes of the statute; the one relevant to the program at issue in this case explains that "[i]t is the purpose of this chapter * * * to assist States and localities to provide for the education of all children with disabilities."

Nothing in Section 1400 offers the slightest support for a finding that the IDEA has a nonsecular purpose. As Justice O'Connor explained two years ago, this Court "is normally deferential to a [legislative] articulation of a secular purpose." *Board of Education v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)). Accordingly, because "a plausible secular purpose for the * * * program may be discerned from the face of the statute," *Mueller*, 463 U.S. at 394-395, the IDEA satisfies the secular-purpose prong of the *Lemon* test.

B. Because the IDEA Neutrally Provides Benefits to a Class Defined Without Reference to Religion, It Has a Permissible and Secular Primary Effect

As discussed above, the IDEA is designed to assist local governments in "provid[ing] education for *all* children with disabilities," 20 U.S.C. 1400(b)(8) (Supp. III 1991) (emphasis added); the statute draws no distinction between sectarian and nonsectarian schools. Only respondent would make the program religion-conscious, because, it has conceded, it would provide an interpreter to any student with the same disability as James Zobrest, whether he was in a public school or a private school, so long as he

was not attending a sectarian private school. See Pet. App. A4-A5; J.A. 34. Accordingly, because the program offers general government benefits on a neutral basis to a class of beneficiaries defined without reference to religion—students with disabilities—it does not have an impermissible primary effect.

1. As the Court recently explained, "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). On the contrary, "a program * * * that neutrally provides [government] assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 398-399 (1983).¹² This Court's decisions offer three separate reasons to support that conclusion in this case. First, when a program distributes benefits generally, it is perverse to treat the fortuitous sectarian status of the particular institution that beneficiaries like petitioners choose to patronize as tainting the effect of the program; rather, "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar v. Vincent*, 454 U.S. 263,

¹² See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) ("we must be careful * * * to be sure that we do not inadvertently prohibit [a government] from extending its general state law benefits to all its citizens without regard to their religious belief"); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 490-491 (1986) (Powell, J., concurring) ("state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test"); *id.* at 493 (O'Connor, J., concurring).

274 (1981).¹³ Second, in cases like this one,¹⁴ where the "financial benefit [is] ultimately controlled by the private choices of individual parents," it is implausible to conclude that the primary effect of the grant is the "attenuated financial benefit" sectarian institutions receive when parents who are beneficiaries enroll their children, *Mueller*, 463 U.S. at 400; it is more natural to conclude that the "primary" effect is the benefit the program grants the parents, in this case, assistance in providing education for children with disabilities. See *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 487 (1986) (upholding program where "[a]ny aid * * * that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").¹⁵ Third, a

¹³ See *Board of Education v. Mergens*, 496 U.S. at 248 (same) (plurality opinion of O'Connor, J.); *Mueller*, 463 U.S. at 397 (same).

¹⁴ As discussed above, regulations under the IDEA prohibit the use of federal funds "to finance the existing level of instruction in a private school or to otherwise benefit the private school." 34 C.F.R. 76.658(a).

¹⁵ The court of appeals concluded (Pet. App. A11) that this line of reasoning is inapplicable here because the program would involve the government placing one of its employees in a sectarian school. We see no logical force to that argument. The location of the employee is irrelevant to the question of why he is there; it is clear that the employee would be placed in a sectarian school only if the parents choose to enroll their child there. What the court of appeals really seems to be suggesting is that the Establishment Clause flatly prohibits placing any public employee in a sectarian school. As we explain below, that suggestion is inconsistent with this Court's decisions.

contrary course of reasoning would lead to absurd results, inconsistent with the traditions of our Nation that have informed this Court's understanding of the Establishment Clause: "If the Establishment Clause barred the extension of general benefits to religious groups, a church could not be protected by the police and fire departments or have its public sidewalk kept in repair." *Widmar*, 454 U.S. at 274-275 (internal quotation marks omitted). In *Witters*, this Court applied that principle to a program strikingly similar to the one at issue here, which allowed the use of government funds to defray the educational expenses of certain handicapped students. In our view, the court of appeals erred in refusing to apply the same principle to this case.

2. The decision of the court of appeals rested on its view that a contrary result was required by this Court's decisions in *School District v. Ball*, 473 U.S. 373 (1985), and *Meek v. Pittenger*, 421 U.S. 349 (1975). We disagree. In those cases, this Court was concerned that the statements of teachers paid by public funds to teach classes in sectarian classrooms would be affected by the sectarian aspects of the atmosphere in which they taught, so that there was an unacceptable chance that public funds would be diverted into religious uses.

Contrary to the court of appeals' understanding, *Ball* and *Meek* do not establish a flat rule prohibiting the government from "plac[ing] its own employee in the sectarian school," Pet. App. A11. Instead, the Court has made clear that the concern on which those decisions rest arises out of the confluence of (a) an individual whose task is sufficiently subjective to allow for the gradual insinuation of sectarian ideology, and (b) the sectarian atmosphere that exists

in the classrooms of a sectarian school.¹⁶ For example, in *Wolman v. Walter*, 433 U.S. 229 (1977), the Court made clear that the Establishment Clause permitted the provision of public health services to students in sectarian schools. *Id.* at 242. Similarly, the Court concluded that diagnostic speech and hearing services could be provided at the same locations,¹⁷ explaining that “[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student.” *Id.* at 244; see *id.* at 247 (therapists should be treated differently, based on the “danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction”).

Application of that reasoning to this case mandates reversal of the judgment of the court of appeals. An interpreter's task, unlike a teacher's, does not involve subjective choices that pose a substantial risk of the intrusion of sectarian ideology. Ethical guidelines require interpreters to “render the message faithfully, always conveying the content and spirit of the speaker.” J.A. 72. Moreover, as one commentator has noted, it would be quite difficult for an interpreter to insinuate sectarian ideas into his translation of a teacher's comments “given the single-minded concentration required to perform the job.” Dixie Snow Huefner & Steven F. Huefner, *Publicly Financed Interpreter Services for Parochial School*

¹⁶ Cf. *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991) (permissible in appropriate circumstances to provide educational services on publicly owned and controlled mobile units parked on the sectarian school's property).

¹⁷ See *Meek*, 421 U.S. at 371 n.21 (same).

Students with IDEA-B Disabilities, 21 J.L. & Educ. 223, 236 n.65 (1992). At bottom, an interpreter is analytically indistinguishable from a hearing aid, which adds nothing to the message conveyed by the teacher. It may be that the sectarian teacher is conveying sectarian ideas, but the interpreter is doing nothing more than translating those ideas so the student can understand what is being said. That activity does not raise a significant Establishment Clause concern.

In sum, the IDEA is a neutral government program dispensing aid to children with disabilities. The primary effect of the program is to increase the educational opportunities for children with disabilities. Because that effect is decidedly secular, the program passes scrutiny under the second prong of the *Lemon* analysis.

C. The IDEA Does Not Result in Excessive Entanglement with Religion

The government activities necessary to administer a grant providing for an interpreter in a sectarian school do not result in an excessive entanglement with religion. The only significant administrative tasks would be ensuring in the first instance that the interpreter was qualified, making arrangements with the school officials to accommodate the presence of the interpreter, and monitoring the interpreter's performance from time to time to ensure that he was performing his job in an adequate manner. Those tasks do not involve government officials in any way with the sectarian administration of the private school and thus cannot involve the “comprehensive, discriminating, and continuing state surveillance

necessary to run afoul of [the entanglement] standard." *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (internal quotation marks omitted). Nor is there any need for the State to engage in any continuing surveillance of the interpreter's activities at the school "to guard against the infiltration of religious thought." *Aguilar v. Felton*, 473 U.S. 402, 413 (1985). When the government has a neutral program providing public health services on a sectarian school's premises, and the program passes the primary effect prong because there is not "an impermissible risk of the fostering of ideological views, [i]t follows that there is no need for excessive surveillance, and there will not be impermissible entanglement." *Wolman v. Walter*, 433 U.S. 229, 244 (1977).

* * * * *

In sum, the holding of the court of appeals construes the Establishment Clause to require respondent to put petitioners to a choice between their sincerely held religious beliefs and James's acknowledged need for an interpreter to enable him to secure an appropriate education. This Court's decisions do not require such a choice. The decision of the court of appeals should be reversed.

II. NEITHER THE IDEA NOR REGULATIONS UNDER THE IDEA BAR RESPONDENT FROM PROVIDING AN INTERPRETER TO A DEAF CHILD IN A SECTARIAN HIGH SCHOOL

Respondent argued in its brief in opposition to the petition (Br. in Opp. 13) that 34 C.F.R. 76.532 bars respondent from providing an interpreter to a deaf child in a sectarian high school. That argument is incorrect. To be sure, the IDEA does not specify the

precise types of assistance educational agencies must provide to students placed in private schools by their parents. Instead, agencies must make services available to such students "to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools." 20 U.S.C. 1413(a)(4)(A) (Supp. III 1991). By regulation, the Secretary of Education has interpreted that provision to require local agencies to "provide students enrolled in private schools with a genuine opportunity for equitable participation" in the programs the agency offers to other students. 34 C.F.R. 76.651(a)(1).

As noted above, respondent's argument rests on 34 C.F.R. 76.532(a)(1), which prohibits the use of federally granted funds to pay for "[r]eligious worship, instruction, or proselytization." But that regulation does nothing more than implement the Secretary's understanding of the requirements of the Establishment Clause, which would prohibit the direct use of federal funds for such overtly religious purposes. It does not suggest in any way that the Department would prohibit respondent from offering a facially neutral program—identical to that available for children in public and nonsectarian private schools—to parents who had enrolled their child in a sectarian school.¹⁸ Because the service requested here would be used to overcome James Zobrest's hearing defect, rather than for religious worship, in-

¹⁸ See Brief for the United States as Amicus Curiae, at 21 n.11, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (O.T. 1985) (explaining this interpretation of Section 76.532(a)(1)).

struction, or proselytization, the service would be consistent with the regulation.¹⁹

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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¹⁹ As this discussion should make clear, we do not agree with the interpretation placed on this regulation by the Fourth Circuit in *Goodall v. Stafford County School Board*, 930 F.2d 363, 369, cert. denied, 112 S. Ct. 188 (1991). We note that the Fourth Circuit did not have the benefit of the Secretary of Education's views when it construed Section 76.532 in *Goodall*.

APPENDIX

20 U.S.C. 1400, 1412-1414 (1988):

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one-million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(1a)

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged

eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving

an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so,

and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412(2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 2791 et seq.] and section 2332 (1) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for—

(A) the development and implementation of a comprehensive system of personnel development, which shall include—

(i) inservice training of general and special educational instructional and support personnel,

(ii) detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and

(iii) effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and

(B) adopting, where appropriate, promising educational practices and materials developed through such projects;

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by provid-

ing for such children special education and related services; and

(B) that—

(i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter,

and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for—

(A) making such reports in such form and containing such information as the Secretary may require to carry out the Secretary's functions under this subchapter, and

(B) keeping such records and affording such access thereto as the Secretary may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under [*sic*] under this subchapter—

(A) will not be commingled with State funds, and

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to handi-

capped children under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subchapter if the Secretary concurs with the evidence provided by the State;

(10) provide, consistent with procedures prescribed pursuant to section 1417(a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education offi-

cials, and administrators of programs for handicapped children, which—

(A) advises the State educational agency of unmet needs within the State in the education of handicapped children,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and

(C) assists the State in developing and reporting such data and evaluations as may assist the Secretary in the performance of the responsibilities of the Secretary under section 1418 of this title;

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing handicapped children and youth with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement; and

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry

out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

(A) the establishment and maintenance of standards which are consistent with any State approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which such personnel are providing special education or related services, and

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

(c) Notice and hearing prior to disapproval of plan

(1) The Secretary shall approve any State plan and any modification thereof which—

(A) is submitted by a State eligible in accordance with section 1412 of this title; and

(B) meets the requirements of subsection (a) and subsection (b) of this section.

(2) The Secretary shall disapprove any State plan which does not meet the requirements of paragraph (1), but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

(d) Participation of handicapped children in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of handicapped children enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all handicapped children enrolled in the

State for services for the fiscal year preceding the fiscal year for which the determination is made.

(B) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(C) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(4) of this section.

(3)(A) The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of title 28.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(e) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for handicapped children within the State.

§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not re-

receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) to provide satisfactory assurance that—

(A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only the excess costs directly attributable to the education of handicapped children; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds; and

(C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas that, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction that are not receiving funds under this subchapter;

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) keeping such records, and affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subparagraph (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

(b) Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(1) A State educational agency shall approve any application submitted by a local educational agency

or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Secretary under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

(c) Consolidated applications —

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an

individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph 7 of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a) (2)(B)(ii) of this section, any local educational agency which is required to carry out any program

for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

20 U.S.C. 1400, 1412-1414 (Supp. III 1991):

SUBCHAPTER I—GENERAL PROVISIONS

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million children with disabilities in the United States today;

[See main edition for text of (2)]

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

[See main edition for text of (6)]

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective spe-

cial education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2) (B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

§ 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established (i) a goal of providing full educational opportunity to all children with disabilities, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

[See main edition for text of (D) and (E)]

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, children with disabili-

ties, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public educa-

tion to be provided children with disabilities in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

§ 1413. State plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

[See main edition for text of (1)]

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of

1965 [20 U.S.C. 2791 et seq.], under which there is specific authority for the provision of assistance for the education of children with disabilities, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in section 1476(b)(8) of this title, a comprehensive system of personnel development that shall include—

(A) a description of the procedures and activities the State will undertake to ensure an adequate supply of qualified special education and related services personnel, including—

(i) the development and maintenance of a system for determining, on an annual basis—

(I) the number and type of personnel, including leadership personnel, that are employed in the provision of special education and related services, by area of specialization, including the number of such personnel who are employed on an emergency, provisional, or other basis, who do not hold appropriate State certification or licensure; and

(II) the number and type of personnel, including leadership personnel, needed, and a projection of the numbers of such personnel that will be needed in five years, based on projections of individuals to be served, retirement and other leaving of personnel from the field, and other relevant factors; .

(ii) the development and maintenance of a system for determining, on an annual basis, the institutions of higher education within the State that are preparing special education and related services personnel, including leadership personnel, by area of specialization, including—

(I) the numbers of students enrolled in such programs, and

(II) the number who graduated with certification or licensure, or with credentials to qualify for certification or licensure, during the past year; and

(iii) the development, updating, and implementation of a plan that—

(I) will address current and projected special education and related services personnel needs, including the need for leadership personnel; and

(II) coordinates and facilitates efforts among State and local educational agencies, institutions of

higher education, and professional associations to recruit, prepare, and retain qualified personnel, including personnel from minority backgrounds, and personnel with disabilities; and

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including—

(i) a system for the continuing education of regular and special education and related services personnel;

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.¹

(4) set forth policies and procedures to assure—

(A) that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing

¹ So in original. The period probably should be a semicolon.

for such children special education and related services; and

(B) that—

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

[See main edition for text of (ii), (5) to (8)]

(9) provide satisfactory assurance that Federal funds made available under this subchapter—

[See main edition for text of (A)]

(B) will be so used as to supplement and increase the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Fed-

eral, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive in part the requirement of this subparagraph if the Secretary concurs with the evidence provided by the State;

[See main edition for text of (10)]

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of children with disabilities (including evaluation of individualized education programs), in accordance with such criteria that the Secretary shall prescribe pursuant to section 1417 of this title;

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities, teachers, parents or guardians of children with disabilities, State and local education officials, and administrators of programs for children with disabilities, which—

(A) advises the State educational agency of unmet needs within the State in the education of children with disabilities,

(B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of children with disabilities and the procedures for dis-

tribution of funds under this subchapter, and

[See main edition for text of (C)]

(13) set forth policies and procedures for developing and implementing interagency agreements between the State educational agency and other appropriate State and local agencies to—

(A) define the financial responsibility of each agency for providing children and youth with disabilities with free appropriate public education, and

(B) resolve interagency disputes, including procedures under which local educational agencies may initiate proceedings under the agreement in order to secure reimbursement from other agencies or otherwise implement the provisions of the agreement;

(14) set forth policies and procedures relating to the establishment and maintenance of standards to ensure that personnel necessary to carry out the purposes of this subchapter are appropriately and adequately prepared and trained, including—

[See main edition for text of (A)]

(B) to the extent such standards are not based on the highest requirements in the State applicable to a specific profession or discipline, the steps the State is taking to require the retraining or hiring of personnel that meet appropriate professional requirements in the State; and

(15) set forth policies and procedures relating to the smooth transition for those individuals participating in the early intervention program assisted under subchapter VIII of this chapter who will participate in preschool programs assisted under this subchapter, including a method of ensuring that when a child turns age three an individualized education program, or, if consistent with sections 1414(a)(5) and 1477(d) of this title, an individualized family service plan, has been developed and is being implemented by such child's third birthday.

(b) Additional assurances

Whenever a State educational agency provides free appropriate public education for children with disabilities, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

[See main edition for text of (c)]

(d) Participation of children with disabilities in private schools; payment of Federal amount; determinations of Secretary: notice and hearing; judicial review: jurisdiction of court of appeals, petition, record, conclusiveness of findings, remand, review by Supreme Court

(1) If, on December 2, 1983, a State educational agency is prohibited by law from providing for the

participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(4) of this section, the Secretary shall waive such requirement, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a)(4) of this section.

(2)(A) When the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services an amount per child which may not exceed the Federal amount provided per child under this subchapter to all children with disabilities enrolled in the State for services for the fiscal year preceding the fiscal year for which the determination is made.

[See main edition for text of (B) and (C), (3)]

(c) Prohibition on reduction of assistance

This chapter shall not be construed to permit a State to reduce medical and other assistance available or to alter eligibility under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities within the State.

§ 1414. Application

(a) Requisite features

A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall

submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are disabled, regardless of the severity of their disability, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

[See main edition for text of (B)]

(C) establish a goal of providing full educational opportunities to all children with disabilities, including—

[See main edition for text of (i)]

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all children with disabilities, first with respect to children with disabilities who are not receiving an education, and second with respect to children with disabilities, within each disability, with

the most severe disabilities who are receiving an inadequate education;

[See main edition for text of (iii) and (iv), (D) and (E)]

(2) provide satisfactory assurance that—

[See main edition for text of (A)]

(B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter—

(i) shall be used to pay only the excess costs directly attributable to the education of children with disabilities; and

(ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of children with disabilities, and in no case to supplant such State and local funds; and

[See main edition for text of (C)]

(3) provide for—

(A) furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement

of children with disabilities participating in programs carried out under this subchapter; and

[See main edition for text of (B), (4)]

(5) provide assurances that the local educational agency or intermediate educational unit will establish or revise, whichever is appropriate, an individualized education program for each child with a disability (or, if consistent with State policy and at the discretion of the local educational agency or intermediate educational unit, and with the concurrence of the parents or guardian, an individualized family service plan described in section 1477(d) of this title for each child with a disability aged 3 to 5, inclusive) at the beginning of each school year and will then review and, if appropriate, revise, its provisions periodically, but not less than annually;

[See main edition for text of (6) and (7); (b)]

(c) Consolidated applications

(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c) (4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively

meet the educational needs of children with disabilities.

[See main edition for text of (2)]

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

[See main edition for text of (1) and (2)]

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

(e) Reallocation of funds

Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by such agency with State and local funds otherwise available

to such agency, the State educational agency may re-allocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all children with disabilities residing in the areas served by such other local educational agencies.

(f) Programs using State or local funds

Notwithstanding the provisions of subsection (a) (2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of children with disabilities pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

34 C.F.R. 76.1, .532, .650-.662, and 300.400-452:

Subpart A—General

REGULATION THAT APPLY TO
STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which Part 76 applies.

(a) The regulations in Part 76 apply to each State-administered program of the Department.

(b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "State formula grant program" means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

- (1) Prepare them to enter into a religious vocation; or
- (2) Prepare them to teach theological subjects.

PARTICIPATION OF STUDENTS ENROLLED IN PRIVATE SCHOOLS

§ 76.650 Private schools; purpose of §§ 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These "bypass" provisions—where they apply—are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§ 76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

- (1) Which children will receive benefits under the project;
- (2) How the children's needs will be identified;
- (3) What benefits will be provided;
- (4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The application or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participating of public school students;

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment or supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§ 300.400 Applicability of §§ 300.401-300.402.

Sections 300.401-300.402 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.401 Responsibility of State educational agency.

Each SEA shall ensure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services—

(1) In conformance with an IEP which meets the requirements of §§ 300.340-300.350;

(2) At no cost to the parents; and

(3) At a school or facility that meets the standards that apply to the SEA and LEAs (including the requirements in this part); and

(b) Has all of the rights of a child with a disability who is served by a public agency.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.402 Implementation by State educational agency.

In implementing § 300.401, the SEA shall—

(a) Monitor compliance through procedures such as written reports, onsite visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards that apply to them.

(Authority: 20 U.S.C. 1413(a)(4)(B))

§ 300.403 Placement of children by parents.

(a) If a handicapped child has FAPE available and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§ 300.450-300.452.

(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§ 300.500-300.515.

(Authority: 20 U.S.C. 1412(2)(B); 1415)

CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS

§ 300.450 Definition of "private school children with disabilities."

As used in this part, "private school children with disabilities" means children with disabilities enrolled

by their parents in private schools or facilities other than children with disabilities covered under §§ 300.400-300.402.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.451 State educational agency responsibility.

The SEA shall ensure that—

(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school children with disabilities in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements in 34 CFR 76.651-76.662 are met.

(Authority: 20 U.S.C. 1413(a)(4)(A))

§ 300.452 Local educational agency responsibility.

(a) Each LEA shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency.

No. 92-91

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and SANDRA
ZOBREST, his parents,
v. *Petitioners,*

CATALINA FOOTHILLS SCHOOL DISTRICT,
— *Respondent.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE
UNITED STATES CATHOLIC CONFERENCE
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-94

LARRY ZORREST, SANDRA ZORREST, husband and wife;
JAMES ZORREST, a minor, by LARRY and SANDRA
ZORREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
UNITED STATES CATHOLIC CONFERENCE
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS*

All active Catholic Bishops in the United States are members of the United States Catholic Conference, a nonprofit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its

people throughout the United States. Of the values that the Conference seeks to promote through its participation in litigation, one of the more important is to resist discrimination on account of religious belief and conscience.

In this case, a public school district has unjustly discriminated against the Zobrest family. They are deprived of a benefit, a sign language interpreter for their child, available to all other similar children in the School District except to those who choose religiously affiliated schools. To sustain this result, the courts below relied on an extreme view of this Court's jurisprudence under the Establishment Clause. The courts were willing to tolerate discriminatory treatment of private individuals on account of their religiously motivated actions. No governmental benefit is extended to religion here. Rather, the consequence of this State action is to deny a much needed public benefit to a needy child. The Conference believes that this Court should instruct that the Establishment Clause is not violated by assisting a needy family under the Education of the Handicapped Act. Indeed, denial of the benefit in this case violates fundamental notions of equality and fairness protected under the Equal Protection Clause.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

Through the Education of the Handicapped Act ("EHA"),¹ Congress guaranteed that every family facing the problem of how best to educate their disabled child will have the benefit of public assistance. Under the Act, state and local educational agencies assist chil-

¹ The Education of the Handicapped Act was retitled as Individuals with Disabilities Education Act in P.L. 101-476, sec. 501, 104 Stat. 1141-42 (1990), 20 U.S.C. §§ 1400 *et seq.* Because the Ninth Circuit's opinion references the EHA, we will do the same in this brief for reasons of consistency.

dren—whether blind, deaf, or otherwise disabled—to help mitigate conditions that might in any way impede their educational progress. Congress thought that this benefit was so important to the public welfare that it mandated that such services should be made available to all children regardless of the school they attend. 20 U.S.C. §§ 1400 (c), 1413(a)(4). Indeed, Congress found that providing services to all disabled children regardless of the school they might attend was essential "to assure equal protection of the law." 20 U.S.C. § 1400(b)(9). Failure to provide services in this case based on religion violates fundamental rights assured to all citizens under the first and fourteenth amendments.

In this case, James Zobrest was denied the services of a sign language interpreter necessary for him to participate fully in classes at Salpointe Catholic High School in Arizona. His parents believed that the best education for him would be in a religiously affiliated school. Acting on the Zobrests' application under the EHA, the School District said that services could be made available *only* if the Zobrests chose a public or nonsectarian private school. The School District thought that the presence of an interpreter in a religious school would violate the Establishment Clause. The Ninth Circuit agreed. *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3061 (1992) (No. 92-94). That classification on religious grounds is unfair and constitutionally flawed. Such an exclusion from public benefits based on religion plainly violates the Equal Protection Clause of the fourteenth amendment. No adequate justification exists for this invidious discrimination.

The Ninth Circuit believed that limitations on the constitutional rights of the Zobrest family were justified because, in its view, providing an interpreter to the Zobrests, in light of their choice of a religious school, would violate the Establishment Clause. If true, the

Ninth Circuit's decision means that an Establishment Clause violation supplants every other constitutional right and interest. This extreme result has never been endorsed by this Court. Indeed, precedent in this Court is to the contrary. *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963) (Establishment Clause concerns do not override free exercise rights). Similarly, this Court has never indicated that a classification based on religion which has the effect of assuring unequal treatment and discrimination on account of religion can be justified by the Establishment Clause. In fact, there is every indication that classifications along religious lines would themselves violate the Establishment Clause. *Larson v. Valente*, 456 U.S. 228 (1982).

This Court has long taught that the Establishment Clause was designed to prevent hostility along religious lines. It has interpreted the Clause to assure that religion will enjoy "benevolent neutrality," not "hermetic separation." More to the point, benevolent neutrality means citizens can expect that government will not be openly hostile to them on account of their religious choices. Yet, the Zobrests' privately motivated choice of a religious school for their son disqualified them from the benefits of a public welfare program, contrary to history, tradition, and precedent under the Establishment Clause. In this case, a straightforward application of *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Mueller v. Allen*, 463 U.S. 388 (1983), mandates that the Zobrests should not be denied a public benefit simply because they chose to send their son to a religious school. No elaborate analysis, or application of the three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is necessary to reach this result.

In deciding Establishment Clause cases, this Court should expressly discard "symbolic union" as part of its jurisprudence. Failing to find any actual establishment of religion, the Ninth Circuit in this case relied on

symbolism and perceptions, thereby shielding its subjective views in language of doubtful constitutional utility. In the last analysis, this Court must reinforce that private individuals do not surrender their right to public benefits once they walk inside the door of a religious school. The only message—symbolic or real—that the Zobrest family could have understood in this case was one of government hostility to religion. That message stands in marked contrast to the law and values of this Court and the Constitution. Religious discrimination has no place in this society.

ARGUMENT

I. PROVISION OF A STATE-PAID SIGN LANGUAGE INTERPRETER TO A DEAF STUDENT ATTENDING A RELIGIOUS SCHOOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The express purpose of the Education of the Handicapped Act is to provide needed special education and related services to all children with disabilities, including those attending private religious schools. 20 U.S.C. §§ 1400(c), 1413(a)(4). The Ninth Circuit nonetheless found that such services for students in religious schools would create a "symbolic union" between government and religion and thereby violate the Establishment Clause. *Zobrest*, 963 F.2d at 1194. The School District, supported by the Ninth Circuit, has singled out religiously motivated choices for special adverse treatment. This is contrary to the principle of benevolent neutrality embodied in the first amendment as well as settled precedent of this Court interpreting the Establishment Clause. Provision of an interpreter to James Zobrest, consistent with the EHA, is not unconstitutional.

A. The Callous Treatment Suffered By The Zobrest Family Is Precisely The Kind Of Hostility Forbidden By The Religion Clauses.

Through the Establishment Clause, the Framers of our Bill of Rights attempted to protect two important values. First, they were concerned about the derogation of individual religious liberty if the state could sponsor religion or religious activity, to the exclusion or disadvantage of others. See *Wallace v. Jaffree*, 472 U.S. 38, 91-107 (1985) (Rehnquist, J., dissenting). At the same time, they were concerned that a new government could not survive under conditions in which its own independence could be compromised by the hegemony of strong churches already in existence. They also recognized, through lamentable experience, what happens to religion when a powerful state dominates churches. Many of the Framers themselves were from denominations that had been subjected to persecution on religious grounds in the Old World and in the New. Thus, through the Religion Clauses, the Framers protected institutional autonomy between government and churches. "The objective is to prevent, as far as possible, the intrusion of either [the state or religious institutions] into the precincts of the other." *Lemon*, 403 U.S. at 614. In doing so, they denied to churches the ability to interfere in the operation of government or the exercise of the power of governance. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982). So, too, they denied to government the opportunity to finance, promote, or sponsor religious activities. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). In its caselaw, this Court has concerned itself with the protection of one or the other or both of these values.

Over forty years ago, this Court held that government cannot exclude individuals from the benefits of public welfare legislation because of their faith, or lack of it. *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The Court cautioned that "we must be careful, in pro-

tecting . . . against state-established churches, to be sure that we do not inadvertently prohibit [a State] from extending its general State law benefits to all its citizens without regard to their religious belief." 330 U.S. at 16. "[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Rather, the government must be neutral on religion and religious matters, not anti-septically so, but benevolently neutral, to allow for religious actions "without sponsorship and without interference." *Walz*, 397 U.S. at 669. Nowhere in its opinion does the Ninth Circuit explain how the provision of a sign language interpreter for James Zobrest raises any of the concerns to which the Establishment Clause is addressed.

No one's religious liberty is being compromised in any respect by the provision of a sign language interpreter. The State is not sponsoring, financing, or engaging in religious activity. The interpreter is simply a conduit for information coming from the hearing world to James Zobrest. It is this medium that the State is empowered to provide through the EHA. It is this medium that the State denies through its discriminatory treatment of the Zobrest family on account of their private, conscientious decision to choose a religious school for their child.² It is as if the government has decided that, because of the likelihood that some religious messages will be passed through this medium to James Zobrest, no messages at all can be passed. Unfortunately, the message the State has passed to James Zobrest is that private religious choices, even ones motivated by deeply held conscientious values, preclude participation in a public benefit program. Denying services to James Zobrest because his

² The question of a Free Exercise Clause violation is addressed by other *amici* supporting petitioners in this case and therefore will not be specifically addressed by this *amicus*.

parents chose a religious school for his education exhibits hostility to religion, a philosophy that has been soundly rejected by this Court. *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

B. Providing A State-Paid Sign Language Interpreter To An Individual Student Involves No State-Supported Religious Exercise In Violation Of The Establishment Clause.

Last Term this Court held that the Establishment Clause was violated when state officials directed the performance of a formal religious exercise (*i.e.*, the recitation of a prayer by a clergyman) at a public school graduation ceremony. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Because the activity appeared to be State-sponsored religious exercise in a public school setting, the majority found that such activity was proscribed thirty years ago by *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963). This Court did not apply *Lemon's* three-part test. No other analytical tools were required. The conclusion was bound directly to the starting point of its analysis: commencement prayer, the Court held, is itself a government-sponsored religious activity in a public school setting.

In other cases, where the facts had been similarly clear, this Court employed the same kind of process to sustain or reject the challenged activity. In *Larson v. Valente*, 456 U.S. 228 (1982), for example, this Court found that discrimination among religions based on their point of view or methods of proselytism violated the Establishment Clause by preferring some kinds of religious expression and activity over others. No three-part test was necessary in order to reach this conclusion. Similarly, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the practice of chaplains opening legislative sessions with prayer was so much a part of American tradition, and indeed part of

the very same Congress that adopted the first amendment, that this Court found it did not need a three-part test or any other elaborate analysis to sustain the challenged activity.

While the *Lemon* test has been criticized by members of this Court³ and commentators alike,⁴ it is not necessary for the Court to apply the *Lemon* test to resolve the constitutional issue presented in this case. The challenged activity is plainly private and does not itself involve any of the concerns that this Court has expressed in its Establishment Clause jurisprudence. It does not involve government sponsorship, financial support, or involvement with religion. *Waltz*, 397 U.S. at 668. Indeed, in this case it is simply the provision of an interpreter, a medium by which a deaf child can receive educational information. It is not tax support for religion or religious schools; it is permission for individuals to participate in a public benefit otherwise freely available to all.⁵ This case is far removed from the kinds of situations in which this Court felt that public aid was being used for the support, explicit or implicit, of religious institutions. The EHA is a general welfare statute that provides funds to

³ See *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace v. Jaffree*, 472 U.S. at 108-13 (Rehnquist, J., dissenting); *Roemer v. Board of Public Works*, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment).

⁴ See M. Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); D. Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 449-50 (1986), and sources cited therein.

⁵ Unless this Court acts to reverse the Ninth Circuit, the public benefit will be available only to those families whose children do not attend religiously affiliated schools. This result is contrary to the will of Congress, 20 U.S.C. § 1400(c). If "coercion" is the new touchstone of a majority's analysis, *Lee v. Weisman*, 112 S. Ct. at 2655, it should focus on the not too subtle coercion of families to choose public non-religious schools by manipulating when public benefits are made available.

states to assist them in supplying special services to all children with disabilities within their jurisdictions. 20 U.S.C. § 1400(c). The sole question here is whether providing a sign language interpreter to a deaf student violates the Establishment Clause. The precedents of this Court make clear that it does not.

1. General Welfare Programs And Statutes That Offer Assistance To A Broad Class Of Individuals Do Not Violate The Establishment Clause.

The EHA contains no classification based on religion. Despite EHA's broad service mandate, the School District nonetheless refused to provide or pay for an interpreter for James Zobrest solely because of his parents' choice to send him to a religious school. *Zobrest*, 963 F.2d at 1192 & n.1. The Ninth Circuit upheld the School District's decision, reasoning that a state-paid EHA interpreter would create a symbolic link between government and religion and violate the Establishment Clause. *Id.* at 1194. The precedents of this Court dictate a contrary result.

In *Witters v. Wash. Dep't of Services for the Blind*, 474 U.S. 481 (1986), this Court held that the Establishment Clause did not prohibit a state from providing special education funds to an individual with a vision disability who sought to use those funds to obtain a religious education. Certain factors were critical to the Court's decision in *Witters*. Any aid that ultimately flowed to the religious institution did so only as a result of a genuinely independent and private choice by the recipient of the aid. 474 U.S. at 487. The aid was generally available to qualified individuals without regard to the affiliation of the schools attended. *Id.* at 487-88. The program created no incentive or greater benefit for individuals to seek a religious education. *Id.* at 488. Finally, and significantly, the decision where to use the funds was not attributable to the State. *Id.* at 489.

The critical rationale underlying *Witters* was that the individual, not the state, made the decision where to apply a neutrally available public benefit. The failure of the legislative program to restrict choices was not material.

Likewise, in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a state statute that allowed an income tax deduction for tuition, textbook and transportation expenses incurred for children attending any elementary and secondary school. The Court emphasized that the deduction was available to all parents. 463 U.S. at 399. Whatever assistance the tax deductions may have provided to religious schools was attributable to the numerous private choices of individual parents of school-age children. *Id.* at 397. Citing *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court concluded that a state program that neutrally and broadly provides a public benefit is not readily subject to challenge under the Establishment Clause. *Mueller*, 463 U.S. at 398-99. In both *Witters* and *Mueller*, this Court was not concerned that private citizens who received benefits under the respective programs might use those benefits to obtain education at a religious school, or even a religious education. The Establishment Clause, after all, limits the choices of government, not individuals.

When evaluating a general welfare program that provides neutrally available benefits without regard to religion, the focal point of the Establishment Clause inquiry should be on whether involvement with religion is caused by government or is the result of a private decision. If the latter, the inquiry need go no further because the proximate cause of the involvement with religion cannot be attributed to the state. "[S]tate programs that are wholly neutral in [providing benefits] to a class defined without reference to religion do not violate the [Establishment Clause] because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at 490-91 (Powell, J., concurring). Govern-

mental assistance which does not induce religious belief or behavior, but instead merely accommodates or implements an independent choice (even a religious one), does not violate the Establishment Clause. *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).

The Zobrests' request for a sign language interpreter fails squarely within the ambit of *Witters* and *Mueller*.⁶ The EHA is general welfare legislation that provides special educational services to children with disabilities without regard to the religious affiliation of the schools they attend. That the interpreter provided the services at the religious school attended by James Zobrest was the result of a private independent choice made by the Zobrests, not attributable to any decision of the School District. Surely, if the Establishment Clause does not prohibit a state from paying for the religious education

⁶ As indicated above, this case can be resolved without resort to the three-part *Lemon* test. However, even if one were to apply the *Lemon* test, the provision of the interpreter to the Zobrests' child passes that test. No one can seriously dispute that the state has a legitimate secular purpose in providing special education services to children with disabilities. See *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975). *Witters* and *Mueller*, discussed in the text above, are dispositive of the primary effect component of the test. Government programs like the EHA that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the primary effect test because any aid to religion results from the private choices of individual beneficiaries. *Witters*, 474 U.S. at 490-91 (Powell, J., concurring). Finally, this case does not require excessive governmental entanglement with religion. See *Meek v. Pittenger*, 421 U.S. at 369-70. Any state supervision involved in evaluating the interpreter's job performance does not involve the type of day-to-day, comprehensive and continuing state surveillance of religious activities that *Lemon* contemplated. *Zobrest*, 963 F.2d at 1203 (Tang, J., dissenting). The Establishment Clause does not prohibit the state from providing a hearing aid to a student attending a religious school. The result should be the same with a sign language interpreter. To conclude otherwise exalts form over substance.

of a disabled individual studying to be a minister, it also does not prohibit a state from paying for a sign language interpreter for a deaf child attending a religious high school.⁷

2. "Symbolic Union" Provides No Principled Basis For Resolving Complex Religion Clause Issues And Should Be Discarded.

Failing to identify any actual harm within the purposes of the Establishment Clause, the Ninth Circuit concluded that allowing a state-paid interpreter for James Zobrest created a "symbolic union" between government and religion in violation of the Clause. *Zobrest*, 963 F.2d at 1194-95. In essence, "symbolic union" is simply the flip side of the "wall of separation" metaphor. Saying that there can be no symbolic union (whatever that means) is simply another way of saying there must be separation. The difficulty with relying on metaphors to decide constitutional questions is that they often are deceptively misleading and tend to oversimplify delicate and complex issues. This Court has rejected outright the proposition that the first amendment requires a "hermetic separation" between religious and other activities. *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976). So too, "symbolic union" is an idea that is ripe for discard. The symbolic union metaphor will only add further confusion "to the already muddled waters of First Amendment jurisprudence," *Thomas*, 450 U.S. at 720 (Rehnquist, J., dissenting), leading to an isolation of religion in society that was never intended by the Establishment Clause.

⁷ In one sense this is an easier case than either *Witters* or *Mueller*. Arguably the programs in those cases involved indirect financial benefits to the religious schools involved. The services provided here did not involve any financial assistance to the religious school attended by James Zobrest. Rather the services (i.e., the sign language interpreter) were provided directly to the individual student with no financial benefit to the school.

Symbolic union was first used in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 389-92 (1985). There, the Court was concerned that providing public school teachers and courses in religious schools might create in the eyes of the students and perhaps the public, an unconstitutional link between government and religion. *Id.* at 385. Notwithstanding its lack of roots in constitutional text or tradition, the principal problem with symbolic union is the dominant role that subjective perceptions play in deciding constitutional issues under that language. It provides no reliable objective standard for courts, administrators, public agencies and citizens to use in understanding and interpreting complex constitutional questions. The breadth of religious diversity in this country ensures that almost every interaction between government and religion will likely be seen by someone as creating a "symbolic union" between government and religion. Cases will be decided, not by reference to outside objective criteria, but according to the individual perceptions and predilections of countless judges throughout the state and federal judicial systems.

One need only look at the present case to see how arbitrary and unworkable is a test that relies on perceptions. The Ninth Circuit concluded that placing a public school employee in a religious school would create the appearance that the School District was a joint sponsor of the school's religious activities. Yet the Ninth Circuit majority never specifically identified *in whose eyes* the appearance was created. The opinion cites no evidence from students, teachers or the public at large. The two judges in the majority must have relied on their own perceptions as to what constitutes a symbolic union. Interestingly, on the same set of facts, the dissenting judge reached a different result. It is reasonable to assume that many others perceive that the same act simply allows James Zobrest to participate in a state program open to all on a fair and equal basis. To them, "symbolic

union" may be seen as healthy and equitable cooperation fully consistent with the principle of benevolent neutrality underlying the Religion Clauses.*

Unprincipled concepts, like symbolic union, create the potential for disruption of much needed government programs designed to promote the common good by inviting the "hermetic separation" of religion from society decried by the Court in *Roemer*. Judicial concepts have a way of expanding to their logical extremes and, with the passage of time, encompassing much more than originally intended. An example of this phenomenon can be found in the abortion jurisprudence from *Roe v. Wade*, 410 U.S. 113 (1973), through *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). If the instant case is any example, symbolic union is no exception. For some individuals and organizations, feeding the hungry, sheltering the homeless, and healing the sick are religiously motivated activities. Governments and religious organizations cooperate in countless government-funded projects across the country to address pressing societal needs. See *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding participation of religious organizations in programs under the Adolescent Family Life Act against an Establishment Clause challenge). For some "a crucial symbolic link between government and religion,"⁹ may be exactly what is needed to solve important social problems. For others, symbolic union is a sword used to attack longstanding, constitutionally permissible cooperation in the public interest.

Because the symbolic union concept is void of any objective criteria, susceptible to arbitrary and conflicting interpretations, and could threaten many worthwhile co-

* Such cooperation is consistent with this country's long history and tradition of church-state relations. M. Chopko, *Religious Access*, *supra* note 4, at 645-52.

⁹ *Grand Rapids*, 473 U.S. at 385.

operative endeavors between government and religion and pose no realistic threat of establishing religion, this Court should discard it as a determinative factor in Establishment Clause jurisprudence. Rather, the Zobrests' case is bounded by this Court's conclusion in *Witters* and *Mueller* that the Establishment Clause is not infringed by allowing benefits to citizens who are free to choose whether and how to apply them consistent with statutory requirements.

II. DISCRIMINATION AGAINST THE ZOBRESTS BASED ON THEIR RELIGIOUS BELIEFS DENIES THEM THE EQUAL PROTECTION OF THE LAW.

Faced with a federal statute declaring that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities *in order to assure equal protection of the law*,"¹⁰ the Ninth Circuit nevertheless dismissed the Zobrests' equal protection claims with a cryptic footnote.¹¹ Considering the fact that the School District's discrimination against the Zobrests was admittedly based solely on religion, and that one of the purposes of the EHA is "to assure that the rights of children with disabilities and their parents or guardians are protected,"¹² it is frankly inconceivable that a federal court could so blithely deny the Zobrests

¹⁰ 20 U.S.C. § 1400(b)(9) (emphasis added).

¹¹ "The Zobrests also argue that denying James Zobrest the assistance of a sign language interpreter would violate the Equal Protection Clause. As our analysis above makes clear, in this context the Free Exercise clause does not provide a fundamental right for the Zobrests: they have no entitlement to state support for James' religious education in the form they seek. Nor can the Zobrests show that the state's treatment of James Zobrest is subject to strict scrutiny because he is a member of a protected class. The state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment. Thus, the Zobrests' Equal Protection argument must fail." *Zobrest*, 963 F.2d at 1197 n.6.

¹² 20 U.S.C. § 1400(c).

their right to equal protection under the fourteenth amendment to the Constitution. For the Zobrest family to be denied the benefit of the EHA solely because of James' attendance at a religious school, and for no other reason, is to relegate one group of disabled citizens to a second-class status because they choose to practice their religious beliefs. As will be demonstrated below, this is not only constitutionally impermissible, it is repugnant to the very idea of individual equality before the law.¹³

A. The Zobrests' Fundamental Rights Are Abridged By The School District's Denial Of EHA Benefits.

The Zobrests had sent their son to non-religious private and public schools until he reached high school age. At that time, after considering their alternatives, the Zobrests chose to send their son to Salpointe Catholic High School. Their decision had more to do with the values they seek for their son than anything else. *Zobrest*, 963 F.2d at 1192. The State, not so subtly, would manipulate that decision by denying this family a benefit that would be available if they had continued to choose any school except a religious school. The Zobrests do not seek benefits not available by law, or even to expand a class of beneficiaries beyond what Congress intended. They only seek what Congress promised would be equally available to them regardless of the religiously motivated, conscientious choice they made. Refusal to honor that

¹³ The School District has announced to this Court its intention to deny the Zobrest family EHA assistance even if such aid does not offend the Establishment Clause. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, 12-13. While admitting that the Zobrests are entitled to the interpreter they seek as a "related service" under the EHA regulations, the School District continues to claim that those regulations bar aid to families whose children attend parochial schools. If Respondent's interpretation of the regulations were correct, which it is not, the Federal denial of due process under the fifth amendment would be just as egregious, and impermissible, as Arizona's denial of equal protection. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

promise is invidious discrimination on account of religion, and impairs the Zobrests' fundamental rights.

The Ninth Circuit acknowledged, in the decision under review, that "denial of aid to the Zobrests does impose a burden on their free exercise rights. . . ." *Zobrest*, 963 F.2d at 1196. Nonetheless, the court says two more things about free exercise rights. First it says that they are "not fundamental" "in this context." *Id.* at 1197 n.6. And it says they may be infringed. *Id.* at 1197. Although the opinion attempts to justify limitations of free exercise rights,¹⁴ the *existence* of the Zobrests' rights is clear. Indeed, neither the Ninth Circuit nor the School District would dare suggest that the free exercise of religion is not a fundamental right under the first and fourteenth amendments.¹⁵ The very reason our first amendment rights have been incorporated into the fourteenth amendment and enforced against the states is that they are "fundamental to the American scheme of justice"¹⁶ and "so rooted in the traditions and conscience of our people as to be as fundamental."¹⁷

Faced with such a clear and universally held proposition, the circuit court says that "in this context" free

¹⁴ The court's justification for denial of free exercise rights is the purported existence of an Establishment Clause violation. The Ninth Circuit finds a conflict in the Religion Clauses and, rather than seek a unifying construction, resolves the conflict by allowing establishment concerns to "trump" free exercise concerns. It cites the Fourth Circuit's decision in *Goodall v. Stafford Co. Sch. Bd.*, 930 F.2d 363 (4th Cir. 1990), *cert. denied*, 112 S. Ct. 188 (1991) as authority, but the authority of this Court is actually to the contrary. *E.g., Widmar*, 454 U.S. at 273 (Establishment Clause concerns "did not justify infringement of other first amendment rights"). Moreover, as indicated in part I of this brief, there is no Establishment Clause violation.

¹⁵ *Cantwell v. Connecticut*, 310 U.S. 276, 307 (1940).

¹⁶ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

¹⁷ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

exercise is not a fundamental right of the Zobrest family. *Zobrest*, 963 F.2d at 1197 n.6. Not only does the court never explain what context is being asserted, but the court does not even attempt to explain why one family does not enjoy the same fundamental rights as another. All the court says is that the Zobrests "have no entitlement to state support for James' religious education in the form they seek." *Id.* As is abundantly clear, however, the Zobrests do not seek state support for religious education in any form. They seek only the sign language interpreter James and all other deaf high school students are entitled to under the EHA.

It is possible that by using the phrase "in this context" to deny the Zobrests their fundamental first amendment right, the court is suggesting that by sending James to a Catholic school at their own expense the Zobrests are not exercising their religion. This unlikely interpretation fails for at least three reasons. First, as noted previously, the court admits elsewhere that the family's free exercise rights are being burdened. *Zobrest*, 963 F.2d at 1196. Second, the parties stipulated and the court accepted that the Zobrests acted on sincerely held religious beliefs in choosing to send James to Salpointe Catholic High School. *Id.* at 1192. Third, and most revealing however, is the conduct and motivation of the School District and the lower courts. In denying EHA assistance to James, they acted solely because of religion. *Id.* To put it another way, the only basis the State had for discriminating against the Zobrests was their religiously motivated conduct. *Id.* at 1192 n.1. If there ever was any doubt about whether the Zobrests were exercising their fundamental right to free exercise in sending James to Salpointe, the School District and the Federal courts resolved that issue clearly.

It is also clear that in choosing a religious school education for James, his parents were exercising another of their fundamental constitutional rights. The right of

parents to direct the education of their children was affirmed explicitly by this Court as recently as 1990 in *Employment Division v. Smith*, 494 U.S. 872, 881 (1990). Even before that specific affirmation of parental rights, however, this Court's opinions had emphasized "the rights of parents to direct the religious upbringing of their children." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). For purposes of equal protection analysis, therefore, there is no doubt that the Zobrests' fundamental rights are at risk in this case.

B. Distinctions Based Upon Religion Are Inherently Suspect Under the Equal Protection Clause.

As discussed above, the Ninth Circuit classified James Zobrest solely on the basis of religion in order to deny him the benefits of the EHA. *Zobrest*, 963 F.2d at 1192. Thereafter it asserted that James Zobrest is not a member of a "protected class" for purposes of equal protection analysis. *Id.* at 1197 n.6. Therefore, the circuit court must have been presuming that religion is not an inherently suspect classification under the fourteenth amendment. On the contrary, the first amendment makes religion a protected class. *Torcaso v. Watkins*, 367 U.S. 488, 491-92 (1961). In *Smith* the special status of religion for equal protection purposes was made explicit:

Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . or the content of speech . . . , so too we strictly scrutinize governmental classifications based on religion.

Smith, 494 U.S. at 886 n.3 (citations omitted).

McDaniel v. Paty, 435 U.S. 618 (1978), is particularly instructive. This Court viewed Tennessee's prohibition against clergy serving in the state legislature as being directed against the "status, acts, and conduct" of a minister or priest. *Id.* at 627. Such a prohibition, the Court said, violates the special protection granted religion by the Free Exercise Clause of the first amend-

ment.¹⁸ *Id.* Justice White found that the primary problem with the Tennessee law was its denial of equal protection to members of the clergy, because it disqualified a class of citizens from holding elective office based upon their practice of religion. *Id.* at 643 (White, J., concurring); see also *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring). Nowhere in this Court's opinions, however, is there a more poignant denunciation of discrimination based on religion than former Chief Justice Burger's opinion in *Meek v. Pittenger*:

The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited *aid to children* is not a step toward establishing a state religion—at least while this Court sits.

¹⁸ Justice Brennan, considering the law violative of the Establishment Clause as well, said that "it establishes a religious classification—involvement in protected religious activity—governing the eligibility for office, which I believe is *absolutely prohibited*." *McDaniel*, 435 U.S. at 632 (Brennan, J., concurring) (emphasis added).

421 U.S. at 387 (Burger, C.J., concurring in the judgment in part and dissenting in part) (emphasis added). From a fourteenth amendment perspective, religion is indeed a suspect classification under the Equal Protection Clause, calling for strict scrutiny by this Court.¹⁹

C. Religious Discrimination Against The Zobrest Family Cannot Survive Strict Scrutiny.

Faced with the Zobrests' argument that they were being denied equal protection of the law, the Ninth Circuit utilized the "rational basis" test and held that "[t]he state's refusal to send a state-paid interpreter into a religious school is rationally related to its goal of avoiding a violation of the First Amendment." *Zobrest*, 963 F.2d at 1197 n.6. The holding is incorrect in its failure to apply strict scrutiny, its presumption that the Establishment Clause would be violated, and its conclusion that avoidance of such a violation is an overriding goal for the state. As discussed in part I of this brief *amicus curiae*, the Establishment Clause is not violated by the provision of a sign language interpreter to James Zobrest, and as examined in parts II, A and B, strict scrutiny is unquestionably the appropriate standard in cases of discrimination based upon religion.

The strict scrutiny standard requires the State to show that discriminatory action is necessary to serve a compelling state interest and is the least restrictive means to that end. *Widmar*, 454 U.S. at 270. Just as importantly, the State bears a heavy evidentiary burden to prove that the strict scrutiny standard is met. *Healy v. James*, 408 U.S. 169, 184 (1972). The only question remaining for an equal protection analysis of this case, therefore, is whether the School District has

¹⁹ *Smith*, 494 U.S. at 886 n.3. For a more exhaustive analysis of why religion qualifies as a suspect classification, see T. Hall, *Religion, Equality, and Difference*, 65 Temp. L. Rev. 1 (Spring 1992).

met its heavy burden of showing that the discrimination against James Zobrest was justified by a compelling state interest.

The School District proposed only one justification for its discriminatory conduct—avoiding a violation of the Establishment Clause. The sole concern was that the state-paid interpreter's presence at Salpointe High School might give the appearance of endorsing religion. The School District offered no proof that this would be the result, but simply argued that avoidance of the risk justified violating James' free exercise rights.²⁰ A similar argument was put forward by the University of Missouri in *Widmar*, 454 U.S. at 270-71. In that case, the Court was willing to allow for the possibility that complying with other constitutional obligations *may* constitute a compelling state interest under some circumstances;²¹ however, the Court found that "[t]he University's argument misconceives the nature of the case." *Id.* at 273. Similarly, the School District's argument here misinterprets the nature of this case. Just as the University had opened its meeting facilities and then sought to exclude religious groups, EHA assistance is offered to all students with disabilities while James Zobrest is excluded solely on religious grounds.

In addition, the fact that the open forum policy might benefit religious groups at the University was considered incidental and not violative of the Establishment Clause. This was true for two reasons: (1) the open forum was not an endorsement of religion but of equal treatment

²⁰ See *Wisconsin v. Yoder*, 406 U.S. at 221:

Where fundamental claims of religious freedom are at stake, however, we cannot accept . . . a sweeping claim [of compelling state interest]; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption.

²¹ *Widmar*, 454 U.S. at 271.

for all student groups; and (2) numerous other groups took advantage of the benefits the forum offered. *Widmar*, 454 U.S. at 274-75. The same factors pertain here: (1) treating James Zobrest like all other high school students advances fairness and equality, not religion; and (2) disabled students receiving EHA assistance at parochial schools could never be more than a minute percentage of the total public school students benefitted by the program. Perceived correctly, therefore, it is obvious that the School District's fear of a possible Establishment Clause violation is illusory. The proper focus is on James Zobrest's statutory and constitutional right to equal protection of the laws.²²

Even if there were a colorable Establishment Clause claim, it is not at all clear that a possible violation of the Establishment Clause is ever sufficient to justify infringement of other constitutional guarantees. One contemporary commentator has stated that "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers." L. Tribe, *American Constitutional Law* 834 (1978). Likewise, a construction of the Constitution that subordinates the Equal Protection Clause to the Establishment Clause ignores the generative history of the Constitution. More than that, such an interpretation would be a logical absurdity and an abuse of basic constitutional principle. *Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.").

Returning to the clergy disqualification statute at issue in *McDaniel v. Paty* is again instructive. Tennessee

²² This focus also eliminates any claim of a regulatory or State constitutional basis for discriminating against the Zobrests. See note 13, *supra*; see also *Widmar*, 454 U.S. at 275-76 (State constitution did not provide compelling state interest sufficient to overcome fundamental right to freedom of expression).

also made the argument that its prohibition was necessary to avoid religious establishments. 435 U.S. at 628. The Court not only rejected the argument but Justice Brennan, in his concurrence, emphasized that the Establishment "Clause will not permit, much less excuse or condone, the deprivation of religious liberty here involved." *Id.* at 640 (Brennan, J., concurring). To allow the School District in this case to use the Establishment Clause to remove James Zobrest from the class of EHA beneficiaries is equally unjustified.

Finally, although an equal protection analysis is not necessary in every case implicating the Religion Clauses,²³ where individuals are excluded from general welfare programs solely or primarily for religious reasons, equal protection analysis is appropriate and promotes the constitutional values of fairness and equality. The *Witters* case, which bears such an important resemblance to this case, is an example of a situation where an equal protection analysis reaches the correct and constitutionally mandated result:

Witters is an easy case under the equal protection model. Witters asked only that he be accorded the same treatment as others similarly situated, and that his religious career choice be respected as one which he was entitled to pursue. Plainly, there is no establishment clause problem in such equal treatment. Just as plainly, to single-out Witters for ex-

²³ Some commentators have, to varying degrees, suggested consideration of such an approach. T. Hall, *Religion, Equality, and Difference*, *supra* note 19; M. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach To Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311 (1986); see generally I. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 19 Conn. L. Rev. 739 (1986); A. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St. L.J. 89 (1980); K. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

clusion from the vocational-aid program in these circumstances in an obvious denial of equal protection with respect to religious exercise.²⁴

James Zobrest is, just as plainly, a victim of invidious religious discrimination and is, like Larry Witters, entitled to relief from this Court.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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²⁴ M. Paulsen, *supra* note 23, at n.264.

No. 92-94

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and
SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF DEAF COMMUNITY CENTER, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether the Establishment Clause bars a public agency from providing sign language interpreter services under the Education for the Handicapped Act (EHA) to a deaf child on the premises of his religious school or from reimbursing his parents for the cost thereof?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-94

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and
SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF DEAF COMMUNITY CENTER, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE*

The Deaf Community Center is a nonprofit 501(c)(3) organization incorporated in Kentucky, with its principal office located at 2422 West Chestnut, Louisville, Kentucky. Mr. Tim Owens is the Executive Director. The Deaf Community Center serves the deaf population in Kentucky and Indiana. The Deaf Community Center works closely with vocational rehabilitation,

* Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37.

and focuses upon finding solutions to problems encountered in family situations where one or more family members are deaf. It provides advice, training and support to individuals in communities to help them with educational programs for deaf students. The Deaf Community Center encourages the training of leaders in the community in the methods and skills necessary to communicate and work with deaf and hearing impaired persons in all walks of life. Given the purposes set out above, Deaf Community Center believes that its view of the relevant law will assist the Court in its evaluation of this case.

SUMMARY OF ARGUMENT

Petitioners, Larry and Sandra Zobrest, requested the Respondent Catalina Foothills School District, pursuant to the provisions of the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400, *et seq.*, and its Arizona statutory corollary, Ariz. Rev. Stat. §§ 15-761, *et seq.*, to provide the assistance of a certified language interpreter for their hearing impaired son, James Zobrest. That assistance was denied by the School District on the grounds that providing an interpreter to a student attending a private, parochial school would violate the First Amendment.

The United States District Court for the District of Arizona¹ and the United States Court of Appeals for the Ninth Circuit² agreed that funding an interpreter for the deaf at a parochial school would violate the Establishment Clause. The ninth circuit held that

¹ 441 EHLR 564 (D. Ariz. 1989) (unreported opinion).

² 1992 W.L. 86206 (9th Cir. (Ariz.)). Attached in its entirety to the Petition for Certiorari at A1.

this funding did not pass muster under the tri-partite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Amicus urges this Court to reverse the decision of the court below and hold that EHA funding may constitutionally be given for sign language interpreters in parochial schools.

Through EHA, the federal government established a program to provide educational assistance for a wide variety of secular purposes. The incidental benefit accruing to a parochial school when a sign language interpreter is provided to an EHA beneficiary is *de minimus*, particularly when compared to the benefits conferred throughout the program. This Court's precedents in analogous situations show that such incidental benefits conferred on a religious organization through a facially neutral federal program do not violate the Establishment Clause.

In addition, this Court has held that a facially neutral government subsidy given to a broad spectrum of secular groups which also incidentally benefits a religious organization does not run afoul of the First Amendment. A family's decision to use neutrally available government aid to assist in the education of their handicapped child, through the mechanical service of sign interpretation, does not create an impermissible union of church and state. James Zobrest should not be denied access to an education simply because a few of the classes interpreted for him are religious. Therefore, the Amicus urges this Court to reverse and remand the decision of the ninth circuit.

I. FUNDING AN INTERPRETER FOR A HEARING IMPAIRED STUDENT AT HIS PAROCHIAL SCHOOL FULFILLS ALL OF THE LEMON TEST REQUIREMENTS AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

This Court uses a three-prong test to assess alleged violations of the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); *Harris v. McRae*, 448 U.S. 297 (1980). As stated in *Harris*:

It is well settled that a legislative enactment does not contravene the Establishment Clause if it has: [1]. a secular legislative purpose; [2]. if its principal or primary effect neither advances nor inhibits religion; [3] if it does not foster an excessive government entanglement with religion.

448 U.S. at 319. *Accord*, *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988). Funding James Zobrest's interpreter in his parochial school fulfills all of the requisites of the *Lemon* test and does not violate the Establishment Clause. The primary secular purpose of such funding is to promote education for the handicapped, and such facially neutral funding does not represent excessive entanglement but instead grants a benefit to the community as a whole.³

³ In finding tax exemptions for religious organizations constitutional, Justice Brennan said in this regard:

these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone to the detriment of the

A. The Exclusive or Predominant Purpose of the EHA Is to Provide Handicapped Students With an Education, Not To Foster a Particular Religious Belief, Thus Fulfilling the First Requirement of the Lemon Test

The first requisite of the *Lemon* Test is that the challenged legislation have a secular purpose. The EHA's secular purpose is provision of education for the handicapped. The impetus for the EHA was not any sort of religious consideration. Accordingly, the funding in the instant case fulfills the first criteria of *Lemon*.

The act of interpreting for the hearing impaired is itself secular. The provision of this interpretation service to handicapped students serves purposes which are predominantly secular. This Court has stated that the legislative purpose requirement is violated *only* when the governmental activity was *motivated wholly by religious considerations*:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it was concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial . . . we saw a secular purpose and no conflict with the Establishment Clause.

Wallace v. Jaffree, 472 U.S. 38 (1985) (footnote omitted), reiterated that the purpose requirement is violated only if a law "is *entirely* motivated by a purpose

community.

Walz v. Tax Commission, 397 U.S. 664, 687 (1970) (Brennan, J., concurring).

to advance religion," and is *not* violated if "motivated in part by a religious purpose." 472 U.S. at 55. This Court has also stressed a "reluctance to attribute unconstitutional motives to the states, particularly when a *plausible secular purpose*" appears on "the face of the statute." *Id.* (emphasis added).

Thus, the primary secular purpose of the EHA—providing an education to deaf children—fulfills the *Lemon* requirement of a secular legislative purpose. Such a secular purpose does not evince a religious purpose. The incidental benefit which may flow to religion cannot invalidate the practice under the Establishment Clause.

The Respondents focus solely upon the religious (rather than the scholastic) context of this case. As this Court previously has pointed out, however, such a myopic vision of activities incidentally benefitting religion would constitutionally invalidate *all* activities which even remotely relate to religion. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1985).

An absolute separation of government benefits from religious organizations under the rubric of separation between church and state has never been required. "[A] hermetic separation of the two is an impossibility . . . [that] has never been required." *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 746 (1976). As this Court stated in *Lemon*:

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense

. . . [The] line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

Lemon, 403 U.S. at 614.⁴

Instead, this "Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987).

B. The Primary Effect of EHA Funding Is to Promote Education for Handicapped Students, Not Promote a Particular Religion, Thus Fulfilling the Second Requirement of the *Lemon* Test

The second requisite of the *Lemon* test is that the legislation at issue does not have the principal or primary effect of advancing or inhibiting religion. The primary effect of the EHA is to assist handicapped students, not to advance religion. Thus, funding a sign language interpreter through the EHA satisfies the second criterion of *Lemon*.

Many decisions of this Court involving analogous governmental activities lend support to the constitutionality of the practice of providing interpreters to

⁴ See also *Wolman v. Walter*, 433 U.S. 229, 263 (1977) ("Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism") (Powell, J., concurring and dissenting); *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980) ("Our decisions have tended to avoid categorical imperative and absolutist approaches at either end of the range of possible outcomes").

the hearing impaired in parochial schools. Those decisions were summarized in *Lynch v. Donnelly*, as follows:

But to conclude that the *primary effect* of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored properties . . . It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws [previously] upheld; the released time program for religious training; and the legislative prayers [also previously] upheld.

Lynch, 465 U.S. at 681-82 (citations omitted).

Federal funding through a facially neutral program which provides educational interpreters for the hearing impaired offers even less threat of secondary effects than those activities described in *Lynch*, or than other activities whose primary effects (and legislative purposes) this Court has upheld: equal use of veterans' benefits for religious higher education, equal access to public university facilities for religious groups,

and judicial resolution of church property disputes through neutral principles.⁵

As this Court held in *Mueller v. Allen*, 463 U.S. 388 (1983), when incidental aid to a parochial school is the result of a parental choice, the primary effect requirement is satisfied: "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval,' can be deemed to have been conferred on any particular religion, or on religion generally." 463 U.S. at 399 (citations omitted). This Court emphasized this point in *Hunt v. McNair*, 413 U.S. 734 (1973):

[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

413 U.S. at 742-43. As this Court noted in *Widmar*, the fact that religious speech may occur in a broad range of secular speech does not "commit the [school] to religious goals." *Widmar*, 454 U.S. at 274.

Accordingly, an incidental government benefit to religion through generalized educational funding cannot have the primary effect of endorsing religion. "Nothing in [this Court's] previous cases prevents

⁵ E.g., *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Jones v. Wolf*, 443 U.S. 595 (1979).

Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems." *Bowen v. Kendrick*, 487 U.S. 589, 607 (1988).

C. There is No Excessive Entanglement by the Provision of an Interpreter, and the Purposeful Exclusion of Parochial Schools From EHA Benefits Would Result in Excessive Entanglement by Showing Hostility to Religion

No excessive entanglement arises from funding an interpreter for James Zobrest or other hearing impaired students in parochial school settings. Also, a school "would risk greater entanglement by attempting to enforce its exclusion of . . . religious speech." *Widmar*, 454 U.S. at 272 n.11.

The same level of governmental interplay with private religious schooling has *already been upheld* by this Court, in *Board of Education v. Allen*, 392 U.S. 236, 244-45 (1968),⁶ in *Mueller v. Allen*, 463 U.S. 388, 403 (1983),⁷ and in other decisions.⁸ A fortiori, the lesser involvement necessary for funding an interpreter for a deaf parochial school student does not produce impermissible entanglement. Moreover, a

⁶ This decision upheld state textbook loans to religious school students.

⁷ *Mueller* sustained state tax deductions and audits for religious school textbooks if secular texts and not if "instructional books and material used in the teaching of religious tenets." 463 U.S. at 390 n.1.

⁸ E.g., *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980). *Regan* upheld state reimbursement of parochial teacher time in grading secular tests and keeping secular records. *Id.* at 657-59.

"real threat" of excessive entanglement must exist, rather than merely an imagined possibility.⁹

This Court has emphasized that being religious does not automatically disable an institution from receiving a benefit from the government. Further, simply being one religious recipient among many secular recipients does not constitute a threat of excessive entanglement. "[R]eligious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Bd. of Public Works*, 426 U.S. 736, 746 (1976).¹⁰ In fact, this Court has upheld against a facial challenge "a statute that provides . . . benefits" "in a neutral fashion to religious and non-religious applicants alike," and the Court has upheld the constitutionality of a specific benefit against an as applied challenge based solely on "the religious character of a specific recipient." *Bowen v. Kendrick*, 487 U.S. at 551 (Kennedy, J., concurring).

This Court has said it is "not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." *Committee for Pub. Educ. v. Regan*, 444 U.S. at 660-61. Interpreters for the deaf should consequently be presumed to relate curricular material acting as neutral conduits for information, rather than

⁹ *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

¹⁰ See also *Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (providing construction grants to "all colleges and universities regardless of any affiliation with or sponsorship with a religious body"); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (approving certain benefits "available to all institutions of South Carolina, whether or not having a religious affiliation").

acting presumptively as envoys introducing religious doctrine.¹¹

Banning this program shows hostility to religion in violation of the Establishment Clause. This case does not involve equal access issues. The same issues of excessive entanglement, however, apply when deaf students may have access to all other types of speech through an interpreter except religious speech. In *Widmar* this Court concluded, "the University would risk greater 'entanglement' by attempting to enforce its exclusion of 'religious worship' and 'religious speech.'" 454 U.S. at 272, n.11.

As this Court observed in *Zorach v. Clausen*, 343 U.S. 306 (1952), when allowing release-time for public school students to attend religious classes:

When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14.

In *Board of Education v. Mergens*, 496 U.S. 226 (1990), this Court arrived at the same conclusion: that the purposeful exclusion of religious speech shows

¹¹ *E.g.*, *Board of Educ. v. Allen*, 392 U.S. at 245 ("this court has long recognized that religious schools pursue two goals, religious instruction and secular education.")

hostility to religion and is therefore in violation of the Establishment Clause. This Court stated this point twice:

Indeed, the message is one of neutrality rather than endorsement; if a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.

Mergens, 496 U.S. at 248.

Indeed, as the Court noted in *Widmar*, a denial of equal access to religious speech might create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Mergens, 496 U.S. at 253-54 (citations omitted).

Singling out religious speech for exclusion causes excessive entanglement in violation of the Establishment Clause: under that approach, governments need to monitor closely all speech to find the infrequent, but prohibited, religious speech. Rather than exhibiting such hostility, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). In the present case, the principle of benevolent neutrality means that James Zobrest's interpreter should be funded.

II. FUNDING SIGN LANGUAGE INTERPRETERS, INCLUDING FOR THE BENEFIT OF DEAF STUDENTS ATTENDING PRIVATE RELIGIOUS SCHOOLS, PROVIDES ONLY AN INCIDENTAL BENEFIT TO RELIGION AND DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The Ninth Circuit erred by ruling that the government's provision of the deaf interpreter to a student attending a parochial school created an unconstitutional "symbolic union" between church and state. Petition Appendix at A-10. The proper constitutional focus in this case should be on the program as a whole, not one particular use of the aid. So analyzed, the program only incidentally aids religion and is therefore constitutional. The Ninth Circuit failed to heed this Court's words in *Bowen v. Kendrick*, 487 U.S. 589 (1989), when this Court said:

We note in addition that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.

487 U.S. at 609.

This Court has ruled in a series of cases that governmental benefits neutrally available to all do not violate the Establishment Clause if religious groups are a portion of the recipients. This is only an incidental benefit to religion and is therefore constitutional. In *Widmar v. Vincent*, 454 U.S. 264, 274 (1981), this Court said:

But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition

against the "primary advancement of religion."

Again, in *Committee for Public Education v. Nyquist*, 413 U.S. at 771, this Court said:

[N]ot every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religion is, for that reason alone, constitutionally invalid.

When a benefit flows from a neutral government program to a broad array of groups, including religious groups, this is a constitutional "incidental benefit to religion." In such instances, religious users are only one among many different recipients, and the criteria for receiving benefits has nothing to do with religion. This standard reflects what this Court has ruled in other cases concerning financial aid to religious groups in a series of recent cases. These cases are *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) and *Bowen v. Kendrick*, 487 U.S. 589 (1988).¹²

¹² This Court has also upheld laws that gave money to religious organizations when the government gave money to secular organizations for the same purposes. See, e.g., *Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (New York statutory scheme reimbursing parochial schools for state-required testing and reporting is constitutional); *Wolman v. Walter*, 433 U.S. 229 (1977) (Ohio statute that provided secular textbooks, standardized testing, diagnostic services and remedial services to parochial school students is constitutional); *Hunt v. McNair*, 413 U.S. 734 (1973) (South Carolina revenue bond scheme to fund construction of buildings at a Baptist college is constitutional) *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal program that funds construction of nonreligious buildings at religious colleges is con-

In *Mueller v. Allen*, the first case of that trilogy, this Court said that benefits available to a wide variety of groups does not violate the Establishment Clause. This Court pointed to the important analogous legal principle of equal access from the free speech-open forum area of First Amendment law:

Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools, and those whose children attend nonsectarian private schools or sectarian private schools. Just as in *Widmar v. Vincent*, 454 U.S. 263 (1981), where we concluded that the State's provision of a forum neutrally "available to a broad class of non-religious as well as religious speakers" does not "confer any imprimatur of state approval," *ibid*, so here: "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Ibid*.

463 U.S. at 397.

The Minnesota tax deduction upheld in *Mueller v. Allen* gives the model of a constitutional program—one matched by the program here. Minnesota demonstrated a secular purpose for the tax deduction—to help all parents defray the expenses amassed by sending their children to school. 463 U.S. at 395. Minnesota granted a state income tax deduction for expenses incurred by parents sending their children

stitutional); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemptions available to all charitable nonprofit groups does not violate the Establishment Clause because religious groups are included in that class).

to any school, public, private or parochial. *Id*. The tax deduction was not limited to private or parochial schools only. 463 U.S. at 398. The tuition tax deduction was only one among many tax deductions available to Minnesota taxpayers. 463 U.S. at 396.

In this case, the government's program provides a benefit to a broad class of people. The Education of the Handicapped Act, 20 U.S.C. §1400 *et seq.*, funds programs to aid all students who are handicapped. The parties have agreed that the program provides sign language interpreters, and that James Zobrest would be entitled to an interpreter if he attended either a public school or a non-religious private school. Cert Petition at A-4. Here the *Mueller* principle—that a neutral government program that provides benefits to a broad range of recipients does not violate the Establishment Clause because some of the recipients are religious—affirms the constitutionality of the funding requested by Petitioners. Interpreters would follow deaf students to private religious schools only because of the private choices made by individuals. In such situations, the program is constitutional because religious groups receive only incidental benefits. This is the clear ruling of *Mueller v. Allen*.

This case parallels this Court's decision in *Witters*. In *Witters*, Larry Witters qualified for a Washington state program that provided college aid for blind people who attended college. The state refused to give money to Larry to attend a Bible college where he wanted to study to be a pastor or youth leader. This Court reversed and ruled that the Establishment Clause did not prevent Larry Witters from receiving funding. This Court found (as in *Mueller v. Allen*) that the program had a secular purpose of aiding

blind people in their educational pursuits (474 U.S. at 495). Also, religious colleges were only one among many different aid recipients of the program. (474 U.S. at 488).

This Court explained in *Witters* that government money that is paid to individuals or secular recipients may then choose to donate it to a religious group. This Court said:

It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

474 U.S. at 486-87.

The reason that these incidental benefits are constitutional is that religious groups receive the benefits only due to the independent and private choices of individuals. This Court in *Mueller v. Allen* said:

Where, as here, aid to parochial schools is available only as result of decisions of individual parents no "imprimatur of state approval," *Widmar*, supra at 274, can be deemed to have been conferred on any particular religion, or on religion generally.

463 U.S. at 399.

This Court reached essentially the same conclusion regarding funding of grantees under the Adolescent

Family Life Act, 42 U.S.C. § 300z *et seq.*, (AFLA) in the case of *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Bowen*, the federal plan funded programs that would discourage teenage sexual activity outside of marriage. Included among the grant recipients were some religious groups. This Court ruled that AFLA was facially constitutional, even though religious groups received some grants. Because AFLA neutrally provided grants to a broad range of groups, the fact that incidental benefits to those religious groups participating in the plan did not lead to the conclusion that AFLA violated the Establishment Clause.

From *Mueller*, *Witters* and *Bowen*, a fundamental principle can be derived; that is, when a government creates a program in furtherance of a secular governmental purpose, and neutrally gives funds to various groups, including some religious groups, the program does not violate the Establishment Clause.

In this case, the Ninth Circuit failed to comprehend this fundamental principle and that court also misunderstood the Establishment Clause as selectively obliterating all religious users of broad-based governmental programs. Such a harsh, erroneously conceived approach violates the axiom that "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Maryland Board of Public Works*, 426 U.S. 736, 746 (1976).

The Ninth Circuit avoided the clear principles about the constitutionality of programs that provide only incidental benefits to religious groups and instead argued from its understanding of *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985) that funding James Zobrest's interpreter would create a "symbolic

link" between church and state because a government interpreter would be translating speech in a parochial school.

"Symbolic union," whatever its merits as a constitutional principle, is not threatened by the neutral provision of interpreter services to assist in the education of profoundly deaf children.¹³ Of course, the Ninth Circuit had to resort to the "symbolic union" notion because the government provides no funds to any religious body under EHA. Deaf students benefit from the provision of the interpreter, not the religious school.

Grand Rapids, readily distinguishable from the present case, does not control the outcome of this case. Here, all deaf students can receive EHA aid, no matter what school they attend. In *Grand Rapids*, this Court struck down a program deliberately targeted to benefit parochial schools. Here, private religious schools are not the primary beneficiary of the Education of the Handicapped Act. Justice Powell stated the proper constitutional principle in his concurring opinion in *Witters*:

state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries.

474 U.S. at 490-91 (citation omitted).

¹³ In such circumstances, "symbolic union" comes to mean, "I cannot put my finger on it, but it is something I do not like."

More importantly, *Witters* stated that *Grand Rapids v. Ball* does not apply to cases like *Zobrest*. In *Witters*, this Court stated that the critical fact was whether "any aid provided under Washington's program . . . ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. This Court added a footnote to that statement and said,

This is not the case described in *Grand Rapids School District v. Ball*, ("Where . . . no meaningful distinction can be made between aid to the student and aid to the school, 'the concept of a loan to individuals is a transparent fiction'")

474 U.S. at 487, n.4 (citations omitted).

The Ninth Circuit misapplied this Court's precedents and confused clear principles. In EHA, Congress established a program to aid in the educating of all handicapped students. Nothing in the legislation states anything about religion. The program is not a sham, a surreptitious funnel to secretly direct government money to religious groups. The program provides aid to any and all handicapped students.

Left unrebutted here, the Ninth Circuit's erroneous reasoning would lead to harsh results in a wide variety of otherwise innocuous programs. For example, a pastor on Medicaid would justifiably be denied a cornea transplant because the government-funded corneas would be used to read religious materials and to write biblical exegeses. No principled basis exists to grant funding under Medicaid to a visually impaired minister and yet deny funding under EHA to an au-

ditorially impaired student. The interpreter fills a mechanical function of merely translating spoken words into sign language. Judge Tang, in his dissent below, correctly said:

A sign language interpreter performs a mechanical service, changing words from one language into another. An interpreter neither adds to nor detracts from the message she conveys, nor does she interject personal views and philosophies into the translation. Unlike teachers and therapists, the sign language interpreter is a technical facilitator of communication, not a potential fount of religious doctrine.

Petition Appendix at A-25.

Such extreme results do not obtain when this Court's reasoning in *Mueller*, *Witters*, and *Bowen* is followed: if the government program has a secular purpose and is neutrally available to all who qualify for the program, then it is constitutional, even if some funds go to religious groups or individuals.

EHA neutrally grants aid to all handicapped students. There is no Establishment Clause violation to be found in funding James Zobrest's sign language interpreter, because at best, the funding provides only an incidental benefit to religion.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the Judgment of the United States Court of Appeals for the Ninth Circuit.

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November 19, 1992.

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife;
JAMES ZOBREST, a minor, by LARRY and SANDRA
ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF AMICI CURIAE OF THE AMERICAN JEWISH
CONGRESS, BAPTIST JOINT COMMITTEE ON PUBLIC
AFFAIRS AND THE UNION OF AMERICAN HEBREW
CONGREGATIONS IN SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICUS

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the separation of church and state, believing that the Establishment Clause of the First Amendment must be given a broad and generous reading in order to protect religious liberty.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is

essential to religious liberty for all Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Union of American Hebrew Congregations (UAHC) is the congregational arm of the Reform Jewry, comprising 850

synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has been a passionate advocate for protecting and strengthening the religion clauses of the First Amendment as the indispensable tools for preserving religious liberty. It has long held that vigorous enforcement of the Establishment Clause is the most effective method for ensuring that religion can flourish free of government control and regulation.

Amici believes that separating church and state, including a ban on government funding for religion, is as an indispensable element of religious liberty as is protecting religious practice from governmental interference. To this end they have opposed schemes to provide aid to parochial schools.

But like any constitutional principle, the principle of separation of church and state can be carried too far. When that happens, the Establishment Clause ceases to protect religious liberty and begins to impede it. The decision below falls into the category of too much of a good thing and hence unnecessarily penalizes a child exercising his right to attend a parochial school.

The letters consenting to the filing of this brief *amici curiae* are on file with the Clerk of this Court.

STATEMENT OF THE CASE

The description of the proceedings below are not in dispute. The amici respectfully refer the Court to the respective statements of the case of the Petitioners and Respondent.

STATEMENT OF THE FACTS

The facts are not in dispute. The amici respectfully refer the Court to the respective statements of fact of the Petitioners and Respondent.

I. THE ONLY ISSUE THE COURT
NEEDS TO DECIDE IS THAT
THE ESTABLISHMENT CLAUSE,
AS CONSTRUED IN *LEMON* v.
KURTZMAN AND ITS PROGENY
DOES NOT BAR PROVIDING
ZOBREST AN INTERPRETER

But for the Establishment Clause, James Zobrest ("Zobrest"), who has been profoundly deaf since birth, would have had a certified interpreter assigned to accompany him to his classes and communicate his teachers' and classmates' words to him and his thoughts to them.¹ The courts below, as well as the Arizona Attorney General in a formal opinion, found that because Zobrest attended a parochial school he was constitutionally barred from receiving assistance indispensable to his education.

1. In its opposition to the Petition for *Certiorari* at 12-13. Respondent contends that as a statutory and regulatory matter, Zobrest is not entitled to a sign language interpreter in a parochial school. That contention was not pressed below. *Amici* accordingly do not address it here.

With the dissent below, we believe that these authorities have misconceived the scope, reach and meaning of existing case law construing the Establishment Clause. This Court need go no further than to correct their errors in interpreting the corpus of law in this area to correct the injustice suffered by *Zobrest*. A *fortiori*, this Court should not disturb the fundamental underlying principle of government neutrality toward religion embedded in *Lemon v. Kurtzman*, 403 U.S. 602 (1977). Such neutrality is, as this Court has repeatedly instructed from the beginning, indispensable to religious liberty.

Thirty years ago, Justice Goldberg, joining in a decision banning religious exercises in the public schools warned that an

untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, even active, hostility to the religious. Such results are not only not compelled by the Constitution, but it seems to me, are prohibited by it.

School District of Abington Township v. Schempp, 374 U.S. 201, 306 (1963).
(emphasis added)

Justice Goldberg provided no simple test which would enable courts to avoid the very overzealousness against which he warned so passionately. On the contrary, he admitted that there was "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible." *Id.* Recognition of the inherent and unavoidable complexity of the

Establishment Clause has become commonplace. *Lynch v. Donnelly*, 465 U.S. 688 (1984); *PEARL v. Regan*, 444 U.S. 646 (1980).

Short of abandoning the enterprise altogether, then, there is no alternative but to grapple with difficult marginal cases and run the risk that in some cases judges will, as happened here, apply the Establishment Clause improperly.

This problem of difficult cases at the margin is not limited to the Establishment Clause. It is equally true of the Fourth Amendment, the Double Jeopardy Clause, and the Confrontation Clause. Difficult cases are, moreover, not limited to constitutional cases. Such cases are equally likely under the Bankruptcy Code and the Tax Code as well.

It is inevitable that cases at the margin will sometimes be wrongly decided,

no matter where the margin is. It hardly follows that the possibility of error is reason for discarding a well settled rule of law because in some such marginal case some judge or judges produce a misapplication leading to an improper or incorrect result.

Those who follow this Court's decisions in even the most cursory fashion know that, complaining in large part of its complexity, several members of the Court have expressed a willingness to jettison, modify or limit the existing standards of *Lemon v. Kurtzman* for adjudicating cases arising under the Establishment Clause.² *Lee v. Weisman*,

2. That test has been explicated and elaborated in numerous decisions of this Court. See, e.g., *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *Stone v. Graham*, 449 U.S. 39 (1980); *PEARL v. Regan*, 444 U.S. 646 (1980); *Mueller v. Allen*, 463 U.S. 388 (1983); *Lynch v. Donnelly*, 465 U.S. 688 (1984); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of* (continued...)

112 S.Ct. 2649 (1992) (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting). Any decision to repudiate *Lemon* in this case would have a substantial impact on the law, over and above the bare fact of the overruling in one fell swoop of numerous decisions of this Court.

Literally hundreds of federal and state court decisions apply the *Lemon* principles to a myriad fact patterns -- some predictable, some not. The decided cases are but a small fraction of the impact of *Lemon* on the law in this area.

2.(...continued)
Thornton v. Caldor, Inc., 472 U.S. 703 (1985); *Grand Rapids City School District v. Ball*, 473 U.S. 373 (1985); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 378 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Texas Monthly Inc. v. Bullock*, 489 U.S. 1 (1989); *PEARL v. Nyquist*, 413 U.S. 756 (1973).

There are settled administrative and political understandings of *Lemon* and its progeny, understandings which govern the day-to-day operation of many governmental agencies, including the public schools, social welfare agencies, park authorities, the military and taxing authorities, to name but a few. All of these understandings would be cast into doubt by a repudiation of *Lemon*, no matter how carefully crafted an opinion overruling *Lemon* might be.

Overruling *Lemon* would not simply excise from the law whatever untoward aspects of *Lemon* the Court might identify in the way a micro-surgeon uses lasers to excise unwanted growths. Because the *Lemon* test has become so entrenched, and is so much a part of the warp and woof of the law in this area. *Lemon* cannot be abandoned without unsettling literally

every other decision in this area, whether the Court intends that result or not.

We do not say that *Lemon* can or should never be reexamined -- although we believe that decision to be fundamentally sound -- but that the Court should do so only where a case would be decided one way under the *Lemon* test and some other way under another test. In other words, consideration of whether to overrule a case of the significance and import of *Lemon* should be avoided except in a case in which the viability of *Lemon* is outcome determinative.

This is not a novel suggestion. This Court has long recognized that Constitutional adjudication is governed by a rule of strict necessity. As Justice Brandeis explained in his authoritative catalog of principles of constitutional adjudication, "[t]he Court will not formulate a rule of

constitutional law — broader than is required by the precise facts to which it is to be applied." *Ashwander v. T.V.A.*, 297 U.S. 288, 347 (1936), cited in, *Webster v. Reproductive Health Services*, 492 U.S. 490, 525-526 (1989) (O'Connor, J., concurring); *Regents v. Ewing*, 474 U.S. 214, 222 (1985).

A rule of necessity ought especially to govern whether the Court overrules prior cases in those instances in which the case under consideration is not a relic of the law. A re-examination of an existing constitutional standard is appropriate where the rule has become a lifeless hulk, because of some other caselaw or statutory developments. *Lemon*, by contrast, has been and is an integral

part of the law for three decades or more.³ Whether *Lemon* is, or ought to continue to be, authoritative, and what impact *stare decisis* ought to have on that decision, Compare, *Casey v. Planned Parenthood*, 112 S.Ct. 2791 (1992) and *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989) with *Payne v. Tennessee*, 501 U.S. ____ (1991), are questions which may have to be addressed some day, but not now and not in this case.

A decision overruling *Lemon* is far broader than is required by the precise

3. *Lemon* itself did not create the three part test out of whole cloth. Instead, the three part test was presented by this Court as a distillation of the teachings of its prior cases going back to *Everson v. New Jersey*, 330 U. S. 1 (1947) and *McCullum v. Bd. of Ed.*, 333 U.S. 203 (1948). It is not surprising that critics of *Lemon v. Kurtzman* do not begin their criticism of the Court's work with that case, but with its earlier decisions. See, e.g., R.L. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982). Thus, the attack on *Lemon* is a convenient mask for an attack on a half century of decisions by this Court.

facts to which it is to be applied because the provision of a sign language interpreter does not violate the Establishment Clause as interpreted employing the *Lemon* criteria. We believe, with the dissent below, that the proper application of *Lemon* and its progeny, including Justice Marshall's opinion in *Witters v. Washington*, 474 U.S. 481 (1986), compel the conclusion that if Arizona were to provide Zobrest with a sign language interpreter, it would not violate the Establishment Clause. This is a sufficient holding to dispose of this case.

II. THE AID AT ISSUE HERE
POSES NO THREAT TO THE
INSTITUTIONAL SEPARATION
INTENDED BY THE
ESTABLISHMENT CLAUSE

In evaluating Zobrest's challenge to the decision below, it is important to keep in mind the underlying purposes of

the Establishment Clause. Most of the provisions of the Bill of Rights act as a direct buffer between the government and its citizens. That is to say, they regulate directly the actions of government as they intrude upon the life of the citizen.

The right to freedom of speech, the right to petition for redress of grievance, and the right to be free of unlawful searches and seizures, and the various trial rights of the criminal defendants embodied in the Bill of Rights operate in precisely this way. A major component of the Establishment Clause operates in the same way by barring government from coercing participation in religious exercises. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990).

The *Lemon* test extends the Establishment Clause beyond the problem of direct coercion to structure the relationships between religion and government. Viewed this way, the Establishment Clause is not only a guarantee of individual liberty, but also a principle of political organization.

The Court has understood the Establishment Clause in this way because it has found, correctly in our view, that maintaining government neutrality in matters of religion was for the founding generation an indispensable element of religious liberty. This was so for two distinct reasons.

State sponsorship of religion was thought to corrupt religion, a point emphasized in the colonial era by the influential Roger Williams, M. DeWolf Howe, The Garden and the Wilderness (1965)

and borne out then and now by experience. On the other hand, insinuating religion into governmental functions necessarily diminishes the liberty of those who do not share the religious views of those who have captured the mechanisms of government to their own theological advantage or those who wish their religious behavior and belief to be the product of their own religious choices, not a response to secular power, points emphasized by James Madison in his seminal Memorial and Remonstrance.

In *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982) this Court quoted *Lemon*, 403 U.S. at 614, for the broad and general proposition that "[t]he objective [of the Establishment Clause] is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other". The Court went on to observe

that this was not a rule enunciated for the first time in *Lemon* but was of lengthy and distinguished ancestry:

The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority. *Watson v. Jones*, 13 Wall. 679 730, 20 L.Ed. 666 (1872), quoting *Harmon v. Dreher*, 1 Speers Eq. 87,120 (S.C.App. 1843).

As these and other cases make clear, the core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions." [citations omitted]

In *Grand Rapids City School District v. Ball*, 473 U.S. 373 (1985), the Court applied *Lemon's* three-part test to invalidate a system of providing aid to parochial schools in the form of public school teachers to provide remedial instruction. In that case, this Court

began its discussion of *Lemon* by putting the test into a political and institutional context by describing the Clause and the *Lemon* test as intended to preserve a certain political distance between the political and religious powers. 473 U.S. at 382.

Justice Brennan continued that mode of analysis throughout his opinion. Thus, later in its opinion the Court observed that:

Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. [citations omitted]

473 U.S. at 389.

In short, the *Lemon* test is not an inflexible rule which operates in isolation from social and political realities. Rather it is a device for screening those practices which are likely to bring about church-state relations of the kind which are harmful to religious liberty and those that are not. *Grand Rapids City School District, supra*, 473 U.S. at 383, citing, *Meek v. Pittenger*, 421 U.S. 349 (1975).

Where a form of governmental assistance creates no structural links of the kind the Constitution proscribes, the Establishment Clause is not violated merely because the state provides an incidental, episodic benefit to religion. To take the simplest example, the provision of routine police and fire services to religious institutions does

not implicate the Establishment Clause because it does not imply any special, structured relationship between church and state. *Everson v. Board of Education*, 330 U.S. 1, 17-18 (1947).

Likewise, when religious speakers take advantage of a traditional public forum to speak, they create no organic ties between their message and the state. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Fowler v. R.I.*, 345 U.S. 67 (1953); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). The Establishment Clause does not restrict that access, because there is no institutional relationship between government and speaker.

When the Establishment Clause is seen in this light, the child benefit theory enunciated in cases such as *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) and *Board of Educ. v. Allen*, 392 U.S. 236 (1968), is

not an aberration or merely an unprincipled bending of principle in the face of sympathetic claims, but a judgment that aid to the child does not create the structured relationship between religion and government which the Framers believed threatened religious liberty.

One can disagree with the decision to classify one or the other benefit as a child benefit and not a benefit to the institution. Likewise, the child benefit principle must be limited by other Establishment Clause values, including a history which demonstrates an intent to forbid government to subsidize religious education. Still, within a carefully circumscribed compass, the principle is sound and well grounded in constitutional theory.

However, where government shoulders a substantial part of the financial burden

of carrying on the function of religious institutions, or where it yields political powers to religious institutions, even in attenuated form, *Larkin v. Grendel's Den*, *supra*, or where it endorses and propagates a religious point of view, *Edwards v. Aguillard*, *supra*, it creates a symbiotic relationship between itself and the church -- which is precisely what the Establishment Clause prohibits.

It is for the reasons that this Court has not permitted the state to pay the salaries of teachers of secular subjects in the parochial schools, *Lemon v. Kurtzman*, *supra*, or even to subsidize or rebate that part of religious school tuition allocated to the secular aspects of parochial school education, or provide remedial or supplementary educational programs within the sectarian schools, or

teach religious theories of origins in the public schools.⁴

In each of these cases the state either assumed part of the responsibility for the operation of the parochial schools or itself undertook the role of religious instructor. In each of these cases, the government was locked into a permanent, close and mutually sustaining relationship with religion.

It is not necessary to defend or critique every line the Court has drawn in this area in order to clearly discern the pattern which emerges from this Court's decisions. Suffice it so say that the crucial factor in that pattern -- that of a symbiotic relationship between church

4. See, *PEARL v. Nyquist*, 413 U.S. 756 (1973); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids City School District v. Ball*, 473 U.S. 373 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Edwards v. Aguillard*, 482 U.S. 378 (1987).

and state where power, authority and expenses are shared in a systematic way -- would be wholly lacking were the Catalina School District to provide Zobrest a sign language interpreter.

III. A DETAILED ANALYSIS UNDER
THE THREE-PART TEST CON-
FIRMS THE PERMISSIBILITY
OF PROVIDING ZOBREST
AN INTERPRETER

In order to pass muster under the familiar three-part test of *Lemon*, a practice must have a secular purpose, a predominately secular effect, and not unduly entangle government with religion. The latter branch of the test has two sub-parts: it inquires whether a practice engenders ongoing, repetitive, controversies over direct appropriations and whether the practice will necessitate

ongoing governmental supervision of religious institutions.⁵

In Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and later adopted by a majority of the Court in *County of Allegheny, supra*, 109 S.Ct. at 3102, the *Lemon* standard has been explained slightly differently. Under this formulation, the *Lemon* inquiry focusses on the question of governmental endorsement of religion:

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer

5. Use of the three-part test does not require a *de novo* inquiry in every case. Courts may decide cases on the basis of other earlier cases applying the test. This case presents such an opportunity, as will be clear in our subsequent discussion of *Witters v. Washington*, 474 U.S. 481 (1986).

to either question should render the challenged practice invalid.

465 U.S. at 690.

Both as formulated originally in *Lemon* and more recently recast in *County of Allegheny, supra*, application of the three-part test in this case demonstrates that providing Zobrest a sign language interpreter does not violate the Establishment Clause.

A. The Aid Has A Secular Purpose

The court below found that providing Zobrest with a sign language interpreter satisfies the secular purpose test, citing *Mueller v. Allen*, 463 U.S. 388 (1983). Respondents apparently do not challenge this holding.

This is plainly correct. This Court has never invalidated even a direct program of aid to parochial schools on grounds that it lacked a secular purpose.

Grand Rapids City School District v. Ball,
supra, 473 U.S. at 383. Cf. *Bowen v.*
Kendrick, 487 U.S. 589, 602-604 (1988).
And surely the reasonable person of
Justice O'Connor's formulation would not
see in the provision of a sign language
interpreter any suggestion that a
handicapped child enjoyed preferred civic
status in benefitting from the same
specialized services for the handicapped
in a parochial school that would be
available in a public school.

B. Providing a Sign Language
Interpreter Has A Primary
Effect That is Secular

"As usual in Establishment Clause
cases . . . the more difficult question is
whether the primary effect of the
challenged statute is impermissible."
Bowen v. Kendrick, 487 U.S. at 604. In
this case, it was this branch of the test
upon which Zobrest's challenge to the

School Board's refusal to provide him with an interpreter foundered. The Court of Appeals' focussed specifically on two aspects of the effects inquiry, neither of which supports the judgment below.

1. Presence on Parochial
School Premises

Relying most heavily on *Aguilar* and *Grand Rapids*, the Court found that the ongoing presence of the interpreter, a public employee, on parochial school premises was constitutionally suspect. That presence, the Ninth Circuit held, would create the appearance of a joint enterprise between the parochial school and the respondent.

It is true that in cases like *Grand Rapids*, *supra*, *Meek v. Pittenger*, *supra* and *Aguilar v. Felton*, *supra*, this Court laid heavy stress on the fact that the publicly provided services would be

provided on school premises. But that geographic fact standing alone was not determinative without regard to the nature of the services provided by government.

There are limited services which can be constitutionally provided on parochial school premises, such as health services and certain diagnostic testing. *Meek v. Pittenger*, *supra*, 421 U.S. at 371, n.21, 364, 368, n.17; and *Wolman v. Walter*, *supra*, 433 U.S. at 241-44. Similarly, government financed school lunch programs take place on parochial school premises, 42 U.S.C. § 1751, *et seq.*,⁶ and no one has thought these programs unconstitutional.

A review of *Grand Rapids*, *Meek* and *Aguilar* indicates that the fact of location was a necessary, but not sufficient, ground for decision. In all

6. In particular, see 42 U.S.C. § 1760(d)(3)(A).

of these cases, the fear was that the presence of public school personnel on school grounds would lead the teacher or counselor to tailor what was taught to avoid conflict with the school, or, because of the educational nature of the services, would suggest to students that the public and parochial school personnel had joined together to provide them with an education.

Moreover, the central mission of a parochial school is sectarian education. Teachers are the vehicles for carrying out that mission. It was the broad discretion teachers and counselors enjoy in selecting how and what to teach which made the location to such a significant factor, for it was thought likely to impermissibly influence those choices.

A sign language interpreter is duty-bound to translate as literally as

possible. There is no discretion to choose materials or manner of presentation. What is demanded of an interpreter is a translation which is as close as possible to what is said orally by others or by Zobrest. There is as little room as humanly possible for discretionary action by the interpreter.

Society places no premium on the exercise of discretion by interpreters, which is the opposite of the case with teachers. Presence on parochial school premises is not likely to influence what the interpreter does as it was in *Grand Rapids* and *Aguilar*. The counselors and therapists at issue in *Meek* and *Wolman*, controlled what was said in the course of

remediation; Zobrest's interpreter merely reports or transmits it.⁷

In any event, even if the presence of a public employee is particularly problematic because it creates a symbolic union of government and religion, the Respondent could simply have allowed the Zobrests to hire an interpreter and reimburse them for those costs. The use of private providers is authorized under the Individuals With Disabilities Act, *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and in this case would have permitted the School District to comply both with its understanding of the

7. A factor of some relevance in *Meek* and *Wolman* was the possibility that educational material would be diverted to sectarian users. That possibility is not present here. The interpreter's duties are circumscribed and not susceptible to conversion to constitutionally suspect tasks.

Establishment Clause and its duties under the Individuals With Disabilities Act.

2. Translation of Religious Subject Matter

The second basis for a finding of impermissible sectarian effect was that in fact the interpreter would be translating subject matter which was religious, whether in terms of required religious services or religious material injected into otherwise secular classes. In the lower court's view, this fact easily distinguished this case from *Meek, Wolman* and *Allen*, in all of which the Court upheld the provision of only secular diagnostic services and textbooks, not religious ones. Compare, *PEARL v. Regan*, 444 U.S. 646 (1980) (discussing constitutionality of reimbursement for administering and grading standardized tests) with *Levitt v. PEARL*, 413 U.S. 472

(1973) (same). For several reasons, it is not ultimately persuasive in this case.

Initially, the Court of Appeals relied heavily on *Meek v. Pittenger* as authority for the proposition that the translation of religious material was impermissible. In that case, this Court noted that it was not, contrary to Chief Justice Burger's suggestion, passing on the "question [of] whether 'the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society, and at the same time to deny those benefits to other children only because they attend . . . a church sponsored school.'" 421 U.S. at 368, n.17, citing the separate opinion of Chief Justice Burger, *id.* at 386. This case

presents that very question; surely Meek cannot be said to have decided a question it reserved in terms which suggest an answer different than the one reached by the Court below.

Moreover, the argument of the Court of Appeals proves too much. No one has ever doubted that the state could supply Zobrest with hearing aids or pay for surgery to restore his hearing (if such surgery were possible) and could do either of these knowing that Zobrest would go to church or attend religious school.

Even Justice Marshall, who was as strict a separationist as has ever graced this Court, acknowledged that general welfare programs such as these are permissible even though they enable beneficiaries to participate more fully in religious activities, *Wolman v. Walter*, *supra*, 453 U.S. at 259 (dissenting

opinion). While it is certainly relevant in weighing the constitutionality of providing Zobrest an interpreter that the program is provided in a parochial school, that is an insufficient basis on which to deny him services which are designed to allow him to "derive[] the benefit normally anticipated from the education required to become a productive member of society."⁸

B. Witters is Controlling Here

8. It is important to emphasize the carefully limited nature of a decision authorizing aid to Zobrest. What Zobrest seeks is narrower than the aid that would be provided under a "voucher" or "choice" program paying for general tuition at a parochial high school. A case involving such a program would raise troubling and complex questions not present here, given the subsidization of general costs of religious institutions, the more systematic nature of the aid provided, the enhanced benefits furnished to private schools and their students, and the need to scrutinize the symbolic and other effects of government aid to religion at the elementary and secondary level even more carefully than in cases involving higher education. See *Tilton v. Richardson*, 403 U.S. 672 (1971). In this case, however, the effect of providing aid to Zobrest should properly be categorized as predominantly secular in nature.

A comparison of the facts in *Witters v. Washington*, 474 U.S. 481 (1986), where the Court rejected a state's contention that an aid to the handicapped program could not be extended to circumstances analogous to those presented here, with the circumstances presented in *Aguilar v. Felton*, 473 U.S. 402 (1985) and *Grand Rapids City School District v. Ball*, 473 U.S. 373 (1985) demonstrates why this case falls on the *Witters* side of the constitutional effects line.

In *Witters*, the state provided financial assistance to the blind to purchase vocational training. At least as far as appeared on the record, *Witters*, who was blind, decided of his own volition to attend a theological seminary and applied for state aid under the vocational training program. The state refused to approve his choice because of the

Establishment Clause. This Court unanimously reversed.⁹

In his opinion for the Court, Justice Marshall emphasized that allowing the payments to go to the theological seminary was not a sophisticated way of channeling state aid to a religious institution. Only small numbers of persons were able to take advantage of the vocational program, and then only if the handicapped individual decided on his or her own to use the benefit at a theological institution. Whatever support flowed from the state to the institution were episodic, idiosyncratic and unpredictable,

9. Several Justices, relying heavily on *Mueller v. Allen*, 463 U.S. 388 (1983), would have upheld grants to Witters on an even broader theory. Because this case is so easily decided in favor of Zobrest on even the narrower theory adopted by Justice Marshall, it is unnecessary to address the broader theory.

and not the product of any policy decision by the state.

Washington's program could not reasonably be categorized as "one of those ingenious plans for channeling state aid to sectarian institutions." 474 U.S. at 488.¹⁰ No institution could budget that aid as a regular part of its income, or count on the state for any portion of its budget in any given year. Nor could it assume that the state would regularly channel blind students to it. In short, there was no ongoing, steady and predictable relationship between church and state which would offend the Establishment Clause.

10. By contrast, when the obvious purpose and effect of a government aid program is to channel aid to sectarian institutions, it should be struck as violative of the Establishment Clause. Such a program is particularly problematic at the primary and secondary school level. Compare, e.g., *Lemon v. Kurtzman*, *supra*, with *Roemer v. Bd. of Public Works*, 426 U.S. 736 (1976).

By contrast, in *Grand Rapids* the School District provided at public expense an extensive educational program in the city's parochial schools. The courses offered, though supplementary to an ill-defined 'core curriculum', were of the kind commonly offered by all schools. These included remedial and enrichment courses in reading, arithmetic, art, music, and other courses regularly part of the public school curriculum. In *Felton*, a local Board of Education provided remedial instruction on the premises of the parochial schools, thus relieving those schools of the burden of providing these quintessentially educational services.

The provision of these services to the parochial schools on the premises of the schools made the government an ongoing joint venturer with the religious schools.

That was the constitutional defect with the program. Religion and state need not be enemies, but they cannot enlist each other in the pursuit of common interests, nor so order their interaction so as to be partners or joint venturers, at least where the services are religious in nature. *Bowen v. Kendrick, supra.*

This case is on all fours with *Witters*. If anything, the aid here is even more attenuated from an Establishment Clause point of view than the assistance upheld in *Witters*. Here, as in *Witters*, the fact that the aid happens to relate to a religious school is pure happenstance, both statistically and in fact. *Zobrest's* attendance at parochial school was entirely a matter of personal choice.

The aid does not in any way underwrite the ordinary costs of operating a school. No substantial numbers of

children need this form of aid in the Catalina School District, and even fewer go to parochial schools, so that the provision of a sign language interpreter cannot be said to be a subterfuge for subsidizing parochial school education in any systematic way. Religious institutions do not receive any disproportionate share of this aid.

But these are not the only relevant distinctions. The aid in Witters ultimately helped pay general costs of a theological education. That is not the case here, where the aid does not pay for the substantive courses at all. Classes in the high school Zobrest attends proceed in exactly the same manner whether or not the translator is present. Education is unaffected for everyone else in the school. Zobrest is the only beneficiary of the aid

Witters permitted the state to pay the entire cost of a religious education. Here the education Zobrest is receiving is both religious and secular, and the bulk of the cost of Zobrest's education is borne not by the state, but by his parents. The state is only being asked to assume that incremental part of the cost directly attributable to Zobrest's handicap. Those costs would not exist but for Zobrest's handicap, which is not the case with Witter's tuition payments.

If the State of Washington could subsidize tuition costs to assist the handicapped learn a trade without violating the Establishment Clause or without setting a dangerous precedent for more general forms of aid to religious institutions, a *fortiori* Catalina Foothills School District can pay the

costs of a translator for Zobrest so that he can have a secondary school education.

D. Providing An Interpreter Does
Not Create Undue Entanglement

The court below did not rest on the third prong of the *Lemon* test, except to dispose hypothetically of the possibility of having the interpreter present for secular courses only, as a means of ensuring a secular effect. Such a proposal might well be unconstitutional under the undue entanglement branch, but as we demonstrate in Point II.B., there is no need to limit the scope of the interpreter's activities in this way merely in order to avoid creating a sectarian effect.

What remains for government to ensure is that the translators do not embark on a self-generated religious frolic. That is fairly simply done, because the super-

vision required to ascertain that is objective -- does the translator translate accurately. It makes no difference whether the interpreter distorts religion, sociology or English literature; and whether he does so for religious or other reasons. The person supervising the translator has no concern with the content as such, but with the words used to transmit these ideas.

Not every form of government oversight of religious institutions' activities is unduly entangling because not every inquiry creates "a comprehensive, discriminatory and continuing state surveillance" such as might breach this branch of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. at 619; *Aguilar v. Felton*, *supra*.

Routine regulatory interaction which involves no inquiries into religious

doctrines are not unduly entangling. *Hernandez v. CIR*, 490 U.S. 680, (1989) (routine IRS accounting inquiries into the cost of providing services in exchange for payments to a § 501(C)(3) organization was not unduly entangling.)¹¹ Where the inquiry is routine, almost mathematical, the undue entanglement test is not violated. *PEARL v. Regan*, 444 U.S. 646 (1980). The oversight here involves words, not numbers, and is therefore marginally less precise than the audits considered in *PEARL v. Regan*, *supra*. Still, the inquiry does not require a government official to pass on religious truths or to make constant and shapeless

11. *Accord, Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985) (required recordkeeping under the Fair Labor Statistics Act not unduly entangling); *Jimmy Swaggert Ministries v. Bd. of Equalization of California*, 493 U.S. 378 (1990) (required sales tax records not unduly entangling).

value judgments about the activities of religious institutions. It is, therefore not unduly entangling.

E. Providing a Translator Will
Not Create Controversy Along
Religious Lines

To the extent that there is anything left of the political divisiveness branch of the test after *Mueller v. Allen supra*, 463 U.S. at 403, n.11; *Bowen v. Kendrick, supra*, 487 U.S. at 616, it is applicable only to direct financial subsidies of parochial schools. *Id.* These are not involved here, and hence this branch of the test is no impediment to the assistance Zobrest is otherwise entitled to receive.

But even if the test were now construed as broadly as when it was first laid down in *Lemon v. Kurtzman*, 403 U.S. at 622-25, it is unlikely that occasionally paying for a sign language

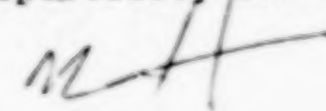
interpreter in a parochial school would generate controversy along political lines. The expenditure would not be a separate one for parochial school education.

Moreover, it is unrealistic to think that there would be any choosing up of sides along religious lines over a payment so clearly tied to assisting the handicapped. Perhaps some uniquely sensitive individual might find the assistance divisive along religious lines, but no reasonable person would see in this aid a suggestion of governmental preference for religion.

CONCLUSION

For the reasons stated, the judgment should be reversed.

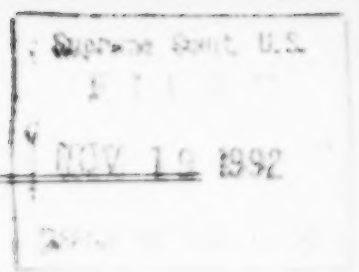
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November 17, 1992



In The
Supreme Court of the United States

October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and
wife; JAMES ZOBREST, a minor, by LARRY and
SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL
SOCIETY, THE NATIONAL ASSOCIATION OF
EVANGELICALS, THE NATIONAL COUNCIL OF
CHURCHES OF CHRIST IN THE USA, THE CATHOLIC
LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE
CHRISTIAN LIFE COMMISSION OF THE SOUTHERN
BAPTIST CONVENTION, THE ASSOCIATION OF
CHRISTIAN SCHOOLS INTERNATIONAL, THE FAMILY
RESEARCH COUNCIL, THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS, JONI AND FRIENDS, AND
THE LUTHERAN CHURCH-MISSOURI SYNOD AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

ARGUMENT

This case raises the deepest problem in the interpretation of the Religion Clauses of the First Amendment: How do the free exercise and nonestablishment principles interact? Are the two Clauses mutually contradictory or mutually reinforcing? Do they serve the same end (the protection of religious freedom) or different ends? The Ninth Circuit concluded that the Establishment Clause would be violated if the State provided a sign language interpreter to a deaf student attending a religious school (Pet. App. A7-A13), that the Free Exercise rights of the student and his parents are burdened if the state denies the interpreter (*id.* at A14), and that the Establishment Clause trumps the Free Exercise Clause (*id.* at A14-A15). In other words, the Establishment Clause means the opposite of the Free Exercise Clause, and the Establishment Clause predominates where there is a conflict.

We believe this view of the Religion Clauses is fundamentally misguided. We believe the two Clauses are harmonious and mutually reinforcing provisions with the central and unifying purpose of protecting the freedom of religion, and that interpretations of the Establishment Clause which appear to create the conflict should be reconsidered and revised.

Petitioner, Jimmy Zobrest, is a profoundly deaf high school student who is entitled under law to the services of a sign language interpreter. The school district stipulated at trial that the State would provide the interpreter if he attended a public or private secular school. Pet. App. A4, A5. The court of appeals held that the Establishment Clause requires the State to deny these services to Jimmy solely because he and his family exercised their constitutional

right to choose a religious education. The court of appeals explicitly recognized that this discrimination against religion would in ordinary circumstances be *prohibited* by the Free Exercise Clause, but interpreted one constitutional provision as requiring violation of another. The court's extreme and destructive interpretation of the Establishment Clause highlights the tendency of an uncritical application of this Court's Establishment Clause precedents to mislead and generate wrong – indeed, outrageous – results.

Under a proper interpretation of the First Amendment this is an easy case. Allowing Jimmy to use the interpreter at an accredited school of his choice does not advance but is neutral toward religion: Jimmy's family is free to decide, without reward or penalty, whether he will be educated in an environment that accords with their religious faith. Conversely, to forbid the use of the interpreter at a religious school is not neutral toward religion but discriminatory against religion: the denial of the interpreter is effectively a penalty on the Zobrests for the exercise of their faith, with no conceivable justification other than the State's erroneous view of the Establishment Clause.

Unfortunately, under current doctrine this is *not* an easy case. The state officials administering the program, the district court, and the court of appeals all concluded that it would violate the Establishment Clause for the State to provide an interpreter for Jimmy's use at the school of his choice. The same conclusion was reached by the Court of Appeals for the Fourth Circuit in a similar case. *Goodall By Goodall v. Stafford County School Bd.*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 188 (1991). Presumably, these officials and courts were conscientiously attempting to apply First Amendment precedents as they understood them. The result below is not a mere aberration, but a symptom of deep and serious misconceptions about the nature of religious freedom under the First Amendment. Those misconceptions are having an impact far beyond the narrow confines of this case. The

idea is abroad in the land that religious influences must be surgically removed from all areas of life in which the government is involved, producing not neutrality and pluralism in the public sphere but what Justice Goldberg called "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion). This Court must correct those elements in current doctrine that have led to results so clearly at odds with the purposes of the First Amendment.

I. The Two Religion Clauses Should Be Read As Complementary Rather Than Contradictory

As many Justices of this Court have observed, current interpretations of the Free Exercise and Establishment Clauses of the First Amendment appear to create a "tension" between the Clauses. *Wallace v. Jaffree*, 472 U.S. 38, 81-82 (1985) (O'Connor, J., concurring); *Thomas v. Review Bd.*, 450 U.S. 707, 720-21 (1981) (Rehnquist, J., dissenting); *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970); *Sherbert v. Verner*, 374 U.S. 398, 414 (1963) (Stewart, J., concurring). The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, *any* government) to discriminate against religion. The Establishment Clause has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions, this means that the government *must* discriminate against religion in the distribution of benefits. Thus, the Establishment Clause is said to require what the Free Exercise Clause forbids.

This case provides an excellent opportunity for this Court to resolve that tension and restore an interpretation of the Religion Clauses that is complementary and harmonious. The prohibition of religious establishments and the guarantee of free exercise do not mean opposite

things. Rather, they serve as mutually reinforcing protections for religious liberty. *Wallace v. Jaffree*, 472 U.S. at 68 (O'Connor, J., concurring). As Justice Goldberg put it in *Schempp*:

These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

374 U.S. at 305 (concurring opinion). The Establishment Clause guarantees that government power will not be used to foster or induce the exercise of religion in general, or of any particular religion; the Free Exercise Clause guarantees that government power will not be used to penalize or suppress the exercise of religion in general, or of any particular religion. Together, the Religion Clauses guard against the use of government power to control, interfere with, reward, or punish the institutions, beliefs, and practices of religion.

A contradictory interpretation of the two Religion Clauses is not historically supportable. The framers of the First Amendment did not view the two parts of the Religion Clauses as separate and independent – let alone as mutually incompatible. It is anachronistic to view free exercise as protecting religion from government and non-establishment as protecting government from religion. The two principles were advocated with equal fervor by the same persons (particularly Baptists and other fervent Protestant sects) and for essentially the same reason: to diminish government power and control over religion. Historian Thomas Curry explains that “[c]ontemporaries did not . . . distinguish between religious oppression as falling under the ban of the ‘free exercise’ clause and a general assessment as being prohibited by the ‘establishment’ clause.” Indeed, “to see the two clauses as separate,

balanced, competing, or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there.” Thomas Curry, *The First Freedoms* 216, 217 (Oxford, 1986). The two Clauses were a unified whole – “a double declaration of what Americans wanted to assert about Church and State.” *Id.*

Moreover, to treat the two parts of the First Amendment that address the relation between government and religion as inconsistent is not only improbable as a matter of ordinary language and intent, but is jurisprudentially incoherent. The function of judicial review rests on the proposition that the Constitution is supreme law, and that statutes or governmental practices, being subordinate to the Constitution, cannot be enforced or implemented if they are inconsistent with the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). If two provisions of the Constitution are in conflict, the courts have no basis for deciding between them.¹ The Ninth Circuit attempted to resolve this problem simply by subordinating the Free Exercise Clause to the Establishment Clause:

Here, denial of aid to the Zobrests does impose a burden on their free exercise rights. . . . However, . . . [t]he government has a compelling interest in ensuring that the Establishment Clause is not violated. It is difficult to imagine a more compelling interest than avoiding a violation of the Constitution.

¹ This is not to deny that some applications of some constitutional provisions may seem to conflict in particular circumstances; for example, freedom of the press can on occasion seem to conflict with the necessities of a fair trial. *E.g.*, *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976). But the supposed conflict between free exercise and nonestablishment is of a different order: as interpreted by the court below, the two Clauses occupy the same field but they mean different things. That is, the conflict between the Clauses is at the core, not in particular unusual applications.

Pet. App. A14-A15. Of course, it would be just as logical to say that, in a conflict, the Free Exercise Clause must prevail. See Laurence Tribe, *Constitutional Law*, § 14-4, at 1168 (2d ed. 1988) (contending that actions "arguably compelled" by the free exercise clause "are not forbidden by the establishment clause"). The court of appeals offered no explanation for choosing to elevate one Clause and not the other.

Such contradictions are a sure sign of analytical error. To say that a single governmental act (refusing to supply an interpreter) is both a burden on the free exercise of religion *and* necessary to avoid an advancement of religion suggests that the court is using inconsistent understandings of "advancement" and "burden." If it appears that the two Clauses point in opposite directions, that is a strong warning that at least one of the two Clauses has been misinterpreted.

II. The Inconsistency Is Caused By The Ninth Circuit's Understanding Of The Establishment Clause

In theory, the conflict between the Religion Clauses perceived by the court below might be attributed to a mistaken construction of either or both. But the Ninth Circuit's conclusion that denial of an interpreter to Jimmy Zobrest imposed a burden on his free exercise rights is unassailable; the conflict is created by its understanding of the Establishment Clause.

Technically, this Court need not reach petitioner's free exercise claim as such. He is entitled to the services of the interpreter under federal and state statute, and the only reason respondent or the lower courts have supplied for denying the interpreter is that it would supposedly violate the Establishment Clause.² If this Court reverses

² It is ironic that, in a day that Congress has enacted the Americans With Disabilities Act and the Education of Handicapped Children Act to *alleviate* prejudice and discrimination

the decision below on the establishment issue, petitioner will prevail; the free exercise claim is not necessary to his case.³ Nonetheless, the free exercise issue is central to the correct disposition of the establishment issue. The most obvious reason to reject the lower court's interpretation of the Establishment Clause is that it would violate petitioner's free exercise rights under any conceivable understanding of the latter Clause.

There is no doubt that seeking an education under religious auspices is a right protected under the Free Exercise Clause. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788 (1973); see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Moreover, there is no doubt that, in this case, a valuable benefit was withheld *solely* because of the exercise of that right. If Jimmy had chosen to attend an equally appropriate private school devoted to progressive politics, feminism, militarism, or Afrocentrism, the State would have provided a sign language interpreter. Because the values espoused by his school are religious, however, Jimmy forfeited this valuable benefit. This is in plain violation of the Free Exercise Clause as interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990). According to this Court in *Smith*, the government may

against the disabled, the court below has construed the Constitution to *mandate* such discrimination in the name of religious freedom.

³ In the Brief in Opposition to Pet. for Cert. (at 13), respondent for the first time sought support for its decision from 34 C.F.R. § 76.532. That regulation, however, is best understood as a regulatory embodiment of the requirements of the Establishment Clause. To the extent that it might be read to deny statutorily-mandated benefits that are *not* impermissible under the Establishment Clause, it would undercut statutory requirements without statutory warrant and would raise issues under the Free Exercise Clause. In the unlikely event that this Court should accept respondent's construction of the regulation, it would be necessary to consider petitioner's free exercise claim directly.

not "impose special disabilities on the basis of religious views or religious status" (*id.* at 877) and any law or governmental action that is "specifically directed at . . . religious practice" is subject to strict scrutiny. *Id.* at 878. Here, the State has singled out students who attend religious schools for a special disability. The prohibition is "specifically directed at religious practice" and thus falls within the core of the protections of the Free Exercise Clause.⁴

In *McDaniel v. Paty*, 435 U.S. 618, 626 (1978), this Court held that the Free Exercise Clause does not permit a state to withhold a civil privilege or benefit on account of a person's exercise of the constitutional right to freedom of religion. A state may not "condition the exercise of one [right] on the surrender of the other." *Id.* In this respect, the protection accorded the free exercise right is parallel to that accorded other constitutional rights. See, e.g. *Rutan v. Republican Party*, 497 U.S. 62 (1990) (state may not condition employment on support for a political party); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state may not condition permit on relinquishment of constitutionally protected property rights); *ECC v. League of Women Voters*, 468 U.S. 364 (1984) (government may not condition subsidy on agreement of broadcaster not to editorialize); *Speiser v. Randall*, 357 U.S. 513 (1958) (state may not condition tax benefit on willingness to sign loyalty oath). Here, the question is whether the state may condition the statutory right to special educational services on the surrender of the free exercise right to obtain one's education in an accredited parochial school. As the Ninth Circuit recognized, the Zobrests "will have either to forgo a sectarian education for James in order to receive the assistance of a sign language interpreter for

⁴ *Amici* do not suggest that respondent would be unconstitutionally discriminating against religion if it provided interpreters only in public schools. The First Amendment prohibits discrimination on the basis of religion – not discrimination between government-operated and private institutions.

him at school, or they will have to pay the cost of the interpreter's services themselves, while keeping him at [the religious school]." Pet. App. A14. This violates the Free Exercise Clause.⁵ Cf. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (the state's policy "forces [petitioners] to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order [to obtain generally available benefits], on the other hand").

The Ninth Circuit was unquestionably correct that denial of an interpreter in this case violated petitioners' free exercise rights. Accordingly, we must examine the court's construction of the Establishment Clause to determine the source of the conflict.

III. As Interpreted By The Court Below, The Three-Part Test Of *Lemon v. Kurtzman* Is The Source Of The Conflict Between Free Exercise And Non-Establishment

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), this Court announced a three-part test for identifying an establishment of religion. Although in recent cases the Court has resolved establishment questions without actual reliance on the *Lemon* test, *Lemon* has neither been jettisoned nor modified. In the state and lower federal courts it remains the predominant – if not the only – test for identifying an establishment of religion. While the *Lemon* test has been criticized frequently by commentators as well as members of this Court, the Court has not come to grips with the inherent inconsistency between

⁵ Moreover, although the analysis is supererogatory here, petitioners' right is also a "hybrid" right as defined in the *Smith* opinion, 494 U.S. at 881-82. Like *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this case involves both free exercise of religion and the due process right of parents to control the education of their offspring. See *Smith*, 494 U.S. at 881.

the test (at least in its common interpretation, as exemplified by the decision below) and the right of free exercise.

Amici would like to make clear that we do not criticize the *Lemon* test because we believe that the government should have greater discretion to foster or encourage favored forms of religious practice. On the contrary, these *amici* are committed to the proposition that the use of government power to advantage any particular view of religion (for or against) is injurious to true religion as well as to the American constitutional order. We thus respect the motives of those on and off the Court who have adhered to *Lemon* as a means of cabining government power over religion. But as this case plainly demonstrates, *Lemon* is a deeply flawed test for achieving this worthy objective. Unless modified or redefined, the *Lemon* test inevitably produces unnecessary and destructive conflicts between the principles of free exercise and nonestablishment.

The *Lemon* test holds that a statute or government practice (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not entail an excessive entanglement between religion and government institutions. In this case, the "secular purpose" requirement was easily satisfied and uncontroversial. We therefore will focus entirely on "effect" and "entanglement."

A. Effect

An effects test is an indispensable part of the analysis of establishment, but it is essential to specify what kind of "effect" is problematic. The principal cause of the conflict in interpretations of the two Religion Clauses has been the conflicting approaches to determining what the effect of government action on religion is. There are two basic problems. First, the test does not distinguish between *governmental preference* for religion and *private*

religious use of neutral and generally available governmental benefits. Properly understood, the former raises an establishment issue; the latter does not. When, as in the decision below, courts interpret *Lemon* as prohibiting private religious uses of generally available benefits, the effect is to require actual discrimination *against* religion. Second, the test does not distinguish between government action that facilitates or removes obstructions to genuinely private choices, which should be upheld as legitimate accommodations of religion, and government action that fosters and induces the exercise of religion, which is the essence of establishment.

We therefore submit that the effects test should be recast as follows: the Establishment Clause prohibits government action that accords religious institutions or activities preferential treatment over nonreligious alternatives in a way that would induce or promote religious exercise.

1. Governmental preference versus neutrality

The most frequently recurring factual pattern in Establishment Clause cases involves government programs that extend various forms of aid or assistance – cash, in-kind benefits, access to government facilities or property, tax benefits – to a range of institutions, ideas, or activities, religious as well as secular. The question is whether participation by religious individuals or institutions on equal and nondiscriminatory terms is a violation of the Establishment Clause. In all candor, the Court's answers to that question have not been consistent. In one line of cases, beginning with *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Everson v. Board of Education*, 330 U.S. 1 (1947), and most recently including *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), the Court permitted the participation of religious institutions and individuals so long as the terms of the program were neutral. In another line of cases, beginning with *Lemon* itself and most recently including *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*,

473 U.S. 402 (1985), the Court barred religious institutions and the individuals using them.

While it is possible, with tortured logic, to distinguish and reconcile many (though not all) of these decisions, at bottom these two lines of cases rest on different and irreconcilable understandings of what it means for government action to "advance religion."⁶

Under one approach (which we will call for convenience the "governmental neutrality" approach), the key question is whether the government has favored religion over nonreligion in setting the terms of the program or in administering it. If aid is "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted, and is in no way skewed toward religion," it does not violate the Establishment Clause. *Witters*, 474 U.S. at 487-88 (citation omitted). See also *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989);

⁶ In *Grand Rapids*, the Court attempted to reconcile the precedents through a distinction between "direct" and "indirect" aid to religion. 473 U.S. at 393-94. Close examination of the cases, however, reveals that these terms are labels for the result rather than tools for analysis. It is hard to see, for example, why the loan of textbooks to parochial schools is "indirect" (*Board of Education v. Allen*, 392 U.S. 236 (1968)), while the loan of instructional materials is "direct" (*Wolman v. Walter*, 433 U.S. 229, 248-51 (1977)); why cash grants to religious colleges are "indirect" (*Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976)), while cash grants to religious high schools for secular purposes are "direct" (*Levitt v. Committee for Public Education*, 413 U.S. 472 (1973)); or why some tax benefits for parents whose children attend religious school are "indirect" (*Mueller v. Allen*, 463 U.S. 388 (1983)), while others are "direct" (*Sloan v. Lemon*, 413 U.S. 825 (1973)). The Court admitted in *Grand Rapids* that the precedents do not distinguish between "aid [that] was formally given to parents and not directly to the religious schools" or between cash grants and in-kind assistance. 473 U.S. at 394. We submit that there is no definition of "direct" and "indirect" that makes sense of these cases.

Mueller v. Allen, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664 (1970). This approach rests on two conceptual foundations. First, the "effect" of government action must be evaluated in the context of the program as a whole. The constitutional principle is that the government may not favor religion over nonreligion, or one religion over another. The First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary." *Everson*, 330 U.S. at 18. In other words, the issue of "advancement" is relative: does the government "advance" religion as compared to nonreligious alternatives?

The second premise of the "governmental neutrality" view is that the Establishment Clause is concerned only about government action fostering religion. The Establishment Clause does not prohibit (and the Free Speech and Free Exercise Clauses protect) private religious speech and activity, even within the context of government programs or aid. *Board of Education v. Mergens*, 496 U.S. at 250; cf. *Lee v. Weisman*, 112 S. Ct. 2649, 2655, 2657-58 (1992). "A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 337 (1987) (emphasis in original).

An excellent example is *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). In *Witters*, the state provided funds to assist blind persons to train for useful occupations. One eligible individual, Larry Witters, wished to study for the ministry at a Bible college. The state supreme court held that the provision of governmental assistance to enable someone to study for the ministry violated the Establishment Clause (*id.* at 485), but this Court unanimously reversed. Following the "governmental neutrality" approach, this Court held that

the assistance "is 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted,' " that it "creates no financial incentive for students to undertake sectarian education," that it "does not tend to provide greater or broader benefits for recipients who apply their aid to religious education," and that "the decision to support religious education is made by the individual, not by the State." *Id.* at 488 (citations omitted).⁷ In other words, since the government action was neutral, neither favoring nor disfavoring religion, the specific use to which the assistance was put was a private matter. In Justice Powell's words: "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Id.* at 490-91 (concurring opinion).⁸

On the same reasoning, the Court has upheld participation by churches in broadly available tax benefits (*Walz, supra*), the use of tax deductions for expenses in religious as well as nonreligious schools (*Mueller, supra*), and the use of public university facilities by a religious

⁷ The Court also noted that the funds were "paid directly to the student" rather than to the religious institution (474 U.S. at 487), which is a fact in common with the instant case. This detail is not, however, of particular importance. In *Grand Rapids* the Court correctly observed that whether aid is "formally given to parents and directly to religious schools" is a mere "difference[] in form" that should not control the outcome. 473 U.S. at 394. What matters is the reality: whether the government acts neutrally, leaving decisions regarding religious uses to the private individuals involved.

⁸ Justice Powell's concurring statement won the support of a majority of the Justices in *Witters*. The Chief Justice and Justice Rehnquist joined Justice Powell's opinion, and two others endorsed it in their separate opinions. See 474 U.S. at 490 (White, J., concurring); *id.* at 493 (O'Connor, J., concurring).

student group for prayer, Bible study, and religious discussion. *Widmar, supra*. Most recently, in *Texas Monthly*, the Court stated the principle as follows: "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." 489 U.S. at 14-15.

Under the other approach (which we will call the "religious uses" approach), the key question is whether government resources have been used to foster or inculcate religion. See *Grand Rapids School District v. Ball*, 473 U.S. at 385 (the Establishment Clause "does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith"); *Levitt v. Committee for Public Education*, 413 U.S. 472, 480 (1973) ("the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."). The underlying theory is that taxpayers may not be compelled to support religious activity, even pursuant to neutral and generally available benefit programs.

These approaches are obviously inconsistent. If it were true that state resources may not be used for religious instruction or activity, *Widmar*, *Walz*, *Mueller*, *Witters*, and the principle stated in *Texas Monthly* would all be wrong. In each of those cases, public resources were made available on neutral grounds to individuals or groups, who then used those resources to advance their religious objectives. If religious uses are unconstitutional, those cases were wrongly decided. Conversely, if non-discriminatory provision of assistance to all eligible persons on the basis of neutral and objective criteria is constitutional, then many of the decisions that have followed *Lemon* were wrongly decided, including, most recently and prominently, *Grand Rapids* and *Aguilar*.

It should be evident that the "religious uses" approach is responsible for creating the conflict with the

Free Exercise Clause, for the Free Exercise Clause does not permit the government to deprive its citizens of generally available benefits on account of their religious activities or commitments. *Employment Division v. Smith*, *supra*; *McDaniel v. Paty*, 435 U.S. at 626; see *Everson*, 330 U.S. at 16 ("we must be careful, in protecting the citizens . . . against state-established churches, to be sure that we do not inadvertently prohibit [the State] from extending its general state law benefits to all its citizens without regard to their religious belief"); *Board of Education v. Mergens*, 496 U.S. at 248 (exclusion of religious groups "would demonstrate not neutrality but hostility toward religion"); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1007-08 (1990). The government neutrality approach, by contrast, is consistent and harmonious with the dictates of the Free Exercise Clause. The Establishment Clause does not require, and the Free Exercise Clause does not permit, government to discriminate against otherwise eligible institutions or individuals in the administration of public programs on the basis of their religious character or commitments.⁹ The belief that the government must discriminate against religious uses in the administration of public programs converts the Establishment Clause from a guarantor of civil liberty into an

⁹ This analysis applies only to programs that provide assistance to a broad range of persons on a general basis. It does not apply to programs in which the government makes specific grants to selected persons or groups to convey opinions and messages from the government to the public. See, e.g., *Bowen v. Kendrick*, 487 U.S. 589 (1988) (grantees under the Adolescent Family Life Act are not entitled to teach or promote religion within the scope of the program); cf. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (grantees under Title X are not entitled to promote or counsel abortion within the scope of the program). In such cases, the recipient of funds is effectively the mouthpiece for the government and is therefore restrained by the Establishment Clause.

instrument for discrimination and intolerance toward religion.

This case is a clear example. Out of the many thousands of deaf children who are provided interpreters under federal and state law, and the many hundreds of thousands who are provided other services to help them to receive an appropriate education notwithstanding their disabilities, only a small fraction would use those services in a religious context. These programs are utterly non-discriminatory. But for the erroneous interpretation of the Establishment Clause, which has interfered with their neutral administration, the statutes extend their benefits to all eligible citizens without regard to the students' religious activities and commitments or the religious elements in their chosen educational program. Yet the Ninth Circuit held that the "primary effect" was to advance religion.

The Ninth Circuit identified two effects of providing an interpreter that it said would "advance religion." First, since the interpreter would assist Jimmy during the entire school day, including morning mass (should Jimmy choose to attend), religion classes, and other classes in which religious insights are incorporated into the curriculum, "[t]he interpreter would be the instrumentality conveying the religious message and experience." Pet. App. A10. Second, "[b]y placing its employee in the sectarian school to perform this function, the government would create the appearance that it is a 'joint sponsor' of the school's activities" and thus create a "symbolic union of government and religion in one sectarian enterprise." *Id.*

This conclusion is the *reductio ad absurdum* of the "religious uses" approach to interpreting the Establishment Clause. If the provision of sign language interpreters to deaf students is viewed realistically, it is obvious that the "primary effect" is to facilitate education and the effect on religion is entirely incidental to its secular purposes. The provision of sign language interpreters to all eligible students on a nondiscriminatory basis "creates no financial incentive for students to

undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education." *Witters*, 474 U.S. at 488. In short, viewed as a whole, the program is neutral: it leaves all choices with respect to education to the individual. Similarly, the program creates no appearance of a "symbolic union" of government and religion. The neutral terms of the program and the broad spectrum of beneficiaries "counteract any possible message of official endorsement of or preference for religion or a particular religious belief." *Mergens*, 496 U.S. at 252. Indeed, the message that is conveyed by a nondiscriminatory program "is one of neutrality rather than endorsement." To single out students who choose religious education "would demonstrate not neutrality but hostility toward religion." *Id.* at 248.

We submit that this Court should adopt the "government neutrality" approach and should explicitly repudiate the "religious uses" approach. The purpose of the First Amendment is to reduce government power and influence over religious decisions – not to place a thumb on the scales in opposition to religion. If aid is extended to a wide range of individuals, activities, or institutions, without regard to the religious-nonreligious nature of the use to which it will be put, and is not skewed in favor of religion, then the program should be considered neutral and permissible under the effects test of *Lemon*. See *Witters*, 474 U.S. at 487-88. Under this approach, the courts need not examine the use to which an individual puts the benefits he receives from the state. The constitutional inquiry is satisfied if the state has not favored religion over nonreligion or created incentives for the practice of religion. Private choices – even in the context of neutral government benefits – do not implicate the Establishment Clause.¹⁰

¹⁰ In addition to reconciling the two Religion Clauses, this approach has the considerable additional benefit of bringing the

2. *Inducements versus accommodation*

The second conceptual problem with the effects test of *Lemon* that produces a conflict with free exercise is the failure to distinguish between programs that "advance religion" in the sense of creating incentives to choose to exercise religion instead of not exercising religion, and those that "advance religion" in the sense of allowing individuals a greater latitude to decide whether or not to exercise religion. When a program advances religious choice it should not be deemed to violate the Establishment Clause.

This should be obvious in a program like the provision of educational services to handicapped children. To the extent that the neutral provision of sign language interpreters has an effect on religion, it is to enable families like the *Zobrests* to make their own decisions about whether to seek a religious education. The decision below, by contrast, imposes a powerful disincentive to making the religious choice. If the *Zobrests* choose the religious alternative, they forfeit an important and extremely valuable benefit. If the decision below is reversed, the incentive effects will be eliminated, one way or the other. The decision will be left, as it should be left, to the family.

Establishment Clause into conformity with definitions of "state action" for purposes of other constitutional principles under the Fourteenth Amendment. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (employment decisions of private school receiving government grants are not "state action" where they were not "compelled or even influenced by any state regulation"); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *West v. Atkins*, 487 U.S. 42 (1988). The Establishment Clause limits the power of the government to promote or engage in religious activity; where the impetus for religious activity is purely private (even if government-assisted under a neutral funding scheme) there is no "state action."

This is not to say that any government action that takes religion specifically into account is unconstitutional. Some programs or statutes – called “accommodations of religion” – “single out” religion for the entirely legitimate purpose of removing obstacles to religious exercise or otherwise facilitating independent choice. *Employment Division v. Smith*, 494 U.S. at 890 (exception from generally applicable laws would be permissible though not constitutionally required); see *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding accommodation specifically targeted to religious organizations); *Gillette v. United States*, 401 U.S. 437, 454-60 (1971) (approving religious exemptions from military conscription). A contrary understanding leads to the anomalous consequence that an accommodation of religion that promotes the purposes of the Free Exercise Clause might be deemed unconstitutional. See *Wallace v. Jaffree*, 472 U.S. at 81-82 (O’Connor, J., concurring). This is a major source of supposed “conflict” between the Clauses. A proper understanding of what is a religious “effect” would make clear why accommodations of religion are not constitutionally objectionable.

We therefore submit that the effects test of *Lemon* should be clarified to focus on whether the law or program under challenge creates an *incentive* to engage in a religious practice. If the government creates no such incentive, then there is no establishment – even though religion may be “advanced” in the sense that obstacles to religious exercise are lifted.

3. Coercion and endorsement.

The position we espouse – that the effects test should be reformulated to prohibit government action that accords religious institutions or activities preferential treatment over nonreligious alternatives in a way that would induce or promote religious exercise – is consistent with both of the prominent alternatives to the *Lemon* test

proposed by members of this Court in recent cases: the “coercion test” and the “endorsement test.”

The purpose of the coercion test is to ensure that the power of the government is not deployed to force or induce religious belief or behavior. See *County of Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J., concurring in part); *Lee v. Weisman*, 112 S. Ct. 2649 (1992). That is precisely the objective of our proposed effects test. The allocation of resources is an important element of governmental power. It must not be used to favor (or to disfavor) religious exercise. Insofar as the allocation of resources is neutral between religion and secular alternatives to religion (as well as among religions), the coercive impact of government action will be minimized. In *Weisman*, the Court held that “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.” *Id.* at 2660. In this case, the school district’s policy does what *Weisman* says it may *not* do – it exacts religious conformity from the Zobrests as the price for receiving their rights under the law to the services of a sign language interpreter. It is the denial of a sign language interpreter to an otherwise eligible student solely because he has chosen to attend a religious school – not the equal provision of services to all eligible students – that has a coercive effect which impairs religious freedom.

Similarly, under the coercion test, specific exemptions or accommodations of religion should be permitted when they are “designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause.” *Texas Monthly*, 489 U.S. at 18 n.8; see also *id.* at 15. In then-Associate Justice Rehnquist’s words, “governmental assistance which does not have the effect of ‘inducing’ religious belief, but instead merely ‘accommodates’ or implements an independent religious choice

does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment." *Thomas v. Review Board*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting). Accordingly, it is appropriate to limit the effects test to instances in which government action would induce or promote religious exercise.

Our proposed reformulation of the effects test is equally compatible with the "endorsement" test. The purpose of the endorsement test is to "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring). Our proposed modification of the effects test embodies that standard, since it is based on the proposition that government programs should neither be skewed in favor of religion nor discriminate against it. Laws that are *objectively* neutral toward religion could not "reasonably" be perceived as an endorsement. By contrast, the "religious use" standard violates the endorsement standard since it requires an active discrimination against religion. As this Court has pointed out in an opinion by Justice O'Connor, the nondiscriminatory administration of a general program of benefits conveys a message "of neutrality rather than endorsement." *Mergens*, 496 U.S. at 251. Indeed, exclusion of religious individuals or groups from neutrally available benefits "would demonstrate not neutrality but hostility toward religion." *Id.* at 248. Similarly, limitation of the effects test to government action that induces, and not merely accommodates, religious exercise is consistent with the endorsement standard. *Wallace v. Jaffree*, 472 U.S. at 82-83 (O'Connor, J., concurring).

The test we propose thus bridges the gap between the coercion and endorsement standards, while correcting the deficiencies of the fatally ambiguous effects test of *Lemon*.

B. Entanglement

The third part of the *Lemon* test prohibits laws or government programs that entail an "excessive entanglement" between government and religion. Perhaps even more than the effects test, the entanglement test has led lower courts astray, because, with all respect, this Court has never made plain what value is served by this part of the *Lemon* test.

In the complex modern world there necessarily will be numerous interactions between government officials and religious institutions. The ideal of "separation of church and state" does not mean, and cannot mean, that church and government have no contact. As Justice O'Connor has pointed out, "[t]he State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion." *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting). On the one hand, "entanglement" is necessary for the state to enforce its civil and regulatory law. Education agencies impose and enforce myriad curriculum, attendance, certification, fire, and safety regulations on sectarian schools, all of which involve some degree of "entanglement." *Wallace v. Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting); see also *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989). On the other hand, "entanglement" is also necessary if religious institutions are to participate on equal terms in the benefits as well as the burdens of public life. In short: not all interactions between church and state are problematical. Yet, under the "entanglement" test as it now stands, lower courts are free to treat any form of interaction as an "entanglement" (or not), without any principled basis for distinction.

This case provides a ready example. The district court found that the provision of a sign language interpreter to a student attending a religious school would entail "excessive entanglement," in part because the public officials would have to engage in periodic evaluations

of the interpreter's work and of Jimmy's educational progress. Pet. App. A35; see Pet. App. A27-A33.¹¹ The court did not explain what distinguishes these routine regulatory contacts from any of the myriad contacts between church and state that happen every day. For the government to review Jimmy's educational progress is completely unexceptional; indeed, the accreditation process for private religious schools entails no less "entanglement" than this. And for the government to evaluate the performance of a government-paid worker does not threaten any of the values of the Establishment Clause (even if the evaluation takes place within a religious institution). See *Aguilar v. Felton*, 473 U.S. at 428-29 (O'Connor, J., dissenting).¹²

The lower court's treatment of the "entanglement" issue has roots in this Court's discussions of so-called "administrative entanglement." In *Aguilar v. Felton*, *supra*, for example, the Court stated that mere "administrative cooperation" between public and religious school personnel with respect to such matters as "schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program" is an unconstitutional entanglement. 473 U.S. at 413. See also Justice O'Connor's discussion of *Meek v. Pittenger*, 421 U.S. 349 (1975), at *id.* at 427. Yet these contacts are no

¹¹ In its one page order, the district court did not explain the precise basis for its "entanglement" holding (Pet. App. A35), but Judge Tang's opinion in dissent in the court of appeals summarizes the arguments made by the school district (Pet. App. A27-A33).

¹² In this respect, *Aguilar v. Felton*, *supra*, and *Meek v. Pittenger*, 421 U.S. 349, 367-72 (1975), should be overruled. It is one thing to say that government supervision of the officials of a religious institution (as in *Lemon* itself) entails excessive entanglement; it is quite another to say that government supervision of a government worker entails excessive entanglement, just because it takes place on the premises of a religious institution.

different in kind from the administrative cooperation and communication needed in the context of administration of the tax laws (*Hernandez*, 490 U.S. at 696-97) or wage and hour laws (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 305-06 (1985)), which the Court has unanimously upheld. It cannot be true that administrative entanglement is significant when a religious institution shares in a government benefit but not when it shares in the burden of taxation or regulation.

We therefore suggest that the concept of "entanglement" be expressly limited to governmental supervision or second-guessing of private speech or of activities or decisions by officials of religious institutions that have religious significance. In *Aguilar* itself, the Court explained that the entanglement test is "rooted in two concerns." 473 U.S. at 409. The first is that the "freedom of religious belief of those who are not adherents of that denomination suffers" when "the state becomes enmeshed with a given denomination in matters of religious significance." *Id.* The second is that the "freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters." *Id.* at 410. Neither of these concerns is implicated when the interaction between state and church is confined to issues of no inherent religious significance. The "administrative entanglement" concept as applied in *Aguilar* thus outstrips the rationale for the doctrine. Properly understood, the provision of a sign language interpreter to Jimmy Zobrest is not problematic. Evaluations of the interpreters' work need not touch on issues of religious significance, and the evaluation of Jimmy's educational performance will likewise focus on secular and objective educational criteria. "Entanglements" of this sort are unavoidable and unobjectionable.

A more fundamental problem with the "entanglement" test is what this Court has called its "Catch-22" quality: the use of the entanglement doctrine to invalidate attempts to enforce the requirements of the effects test. *Bowen v. Kendrick*, 487 U.S. at 615; see also *Aguilar v. Felton*, 473 U.S. at 429-30 (O'Connor, J., dissenting);

Roemer v. Maryland Board of Public Works, 426 U.S. at 768-69 (White, J., concurring). *Amici* believe that this problem is principally created by the misinterpretations of the effects test, discussed above. Once it is recognized that the participation of religious institutions and individuals in neutral and generally available public benefits is not unconstitutional – that the question is whether the program is “skewed toward religion” and *not* whether a particular application of the program happens to benefit religion – the need for the monitoring and scrutiny that has been condemned under the entanglement test should come to an end. It remains true that the Constitution is offended when government agents in the course of an otherwise neutral program monitor private activities to detect any signs of religious teaching. Absent compelling justification, this should not be allowed; it violates the principles of free exercise and free speech.¹³ But this sort of interference with the First Amendment rights of private individuals and organizations should not be the basis for suits by outsiders, as taxpayers, under the Establishment Clause. The victims of this form of unconstitutional activity are those being monitored, not their ideological opponents in the courtroom. To the extent (if any) that “entanglement” injures the interests of outsiders, it can more sensibly be assimilated within the “effects” test, as Justice O’Connor has suggested. See *Aguilar v. Felton*, 473 U.S. at 430 (O’Connor, J., dissenting). In other respects, entanglement should be recognized as a free exercise problem. See Douglas Laycock, *Toward A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81

¹³ We reiterate that this analysis does not apply to programs in which government funds are provided to selected private institutions for the purpose of conveying a message from the government to the public. The government may monitor such institutions to ensure that the funds are not used to teach or promote religion, just as it may monitor its own employees. See note 9, *supra*.

Colom. L. Rev., 1373, 1383 (1981) “[o]nly the church is harmed by (entanglement), and only it should have standing to complain”.¹⁴

IV. *Stare Decisis* Permits Reconsideration and Reformulation of the *Lemon* Test

Amici appreciate the weight that should be given to established precedent, but respectfully suggest that considerations of *stare decisis* do not stand in the way of rethinking and reformulating the test for establishments of religion. Even so faithful an advocate of adherence to precedent as Justice O’Connor has commented that she could not defer to precedents setting forth the entanglement doctrine because she “could discern [no] logical support for their analysis.” *Aguilar v. Felton*, 473 U.S. at 427 (O’Connor, J., dissenting); see also *Wallace v. Jaffree*, 472 U.S. at 68 (O’Connor, J., concurring) (“[d]espite its initial promise, the *Lemon* test has proved problematic”).

¹⁴ We assume that the doctrine of “political entanglement” has already been repudiated by this Court. *Lynch v. Donnelly*, 465 U.S. 668, 684 (1984) (“this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct”); see also *Bowen v. Kendrick*, 487 U.S. at 617 n.14; *Corporation of Presiding Bishop v. Amos*, 483 U.S. at 339 n.17; *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring). For a critique of the doctrine, see Edward McGlynn Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 St. Louis U.L.J. 205 (1980). It would nonetheless be advisable for the Court to reiterate that this doctrine has been overruled. Many state and local government officials and lawyers, as well as lower courts, have not gotten the message. See, e.g., *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1152 (4th Cir. 1991); *Cammack v. Waihee*, 932 F.2d 765, 781, petition for rehearing denied, 944 F.2d 466 (9th Cir. 1991), cert. denied, 112 S. Ct. 3027 (1992); *Spacco v. Bridgewater School Department*, 722 F. Supp. 834, 847-48 (D. Mass. 1989); *Board of Education v. Sanders*, No. 90 C 3063, 1991 U.S. Dist. LEXIS 6708, *41-*42 (N.D. Ill. May 15, 1991).

She has also proposed modifications in the "purpose" and "effects" tests of *Lemon*. See *id.* at 83 (O'Connor, J., concurring). Indeed, six Justices of this Court have expressly endorsed abandonment or modification of the *Lemon* test, and a seventh, by his conspicuous failure to cite *Lemon* in his separate opinion in *Lee v. Weisman*, 112 S. Ct. at 2667-78 (Souter, J., concurring), suggests that he, too, finds that test less than helpful. This is not surprising, since the *Lemon* test is so fatally ambiguous that it has produced wildly inconsistent results.¹⁵

From its inception, the *Lemon* test was not intended to be the exclusive or authoritative definition of establishments of religion. In the companion case to *Lemon*, *Tilton v. Richardson*, 403 U.S. 672 (1971), the author of *Lemon*, Chief Justice Burger, observed that "there is no single constitutional caliper that can be used" to determine the existence of an establishment and that the three parts of the *Lemon* test should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.* at 677-78. This characterization has been reiterated many times over the years. See *Nyquist*, 413 U.S. at 773 n. 31 (calling the *Lemon* test a "guideline"); *Mueller v. Allen*, 463 U.S. at 394 (calling it "no more than [a] useful signpost"); *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area"). In two recent cases, the Court has decided Establishment Clause questions without even the pretense of reliance on *Lemon*. *Lee v. Weisman*, *supra*; *Marsh v. Chambers*, 463 U.S. 783 (1983).

The decision facing this Court is not whether to depart from settled precedent, but how to reconcile a mass

of inconsistent cases and interpretations of unsettled doctrine. The goal should be to produce an approach to the Establishment Clause that is not at war with the Free Exercise Clause – an approach that is rooted in the historic purposes of the Clause to protect the People from the power of government to assert control over their religious decisions, institutions, and commitments. As this case so plainly illustrates, the *Lemon* test in its current formulation fails in that task. It invites lower courts to discriminate against religion in the administration of public programs, in violation of the principles of free exercise.

We therefore urge this Court to reverse the decision below and restore to Jimmy Zobrest and his family the rights guaranteed by the Education for Handicapped Children Act as well as the Free Exercise Clause. But in reversing the decision below, we urge this Court to take the opportunity to chart a new course that will reconcile the two Religion Clauses of the First Amendment around the overriding principle of religious liberty.

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¹⁵ For a catalog of the inconsistencies of the Court's decisions in this area, see *Wallace v. Jaffree*, 472 U.S. at 110-12 (Rehnquist, J., dissenting).

APPENDIX

Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center For Law And Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its

full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom: "Congress shall make no law . . . "

The **National Association of Evangelicals** is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **National Council of the Churches of Christ in the USA** is a community of communions composed of thirty-two national religious bodies, Protestant and Eastern Orthodox, having an aggregate membership of more than 40 million adherents in the United States. It is governed by a board of some 260 members selected by its member communions in proportion to their size and support of the Council. The Council does not claim to speak for all of its adherents but seeks to carry out the wishes of their representatives as expressed in the policies they adopt through the General Board.

Among these policies was a historic resolution "On Federal Aid to Education" that helped to shape the "church-state settlement" that made possible the enactment of the Elementary and Secondary Education Act of 1965. It endorsed the "child benefit" theory underlying

Everson v. Board of Education (1977), thus permitting certain kinds of aid to flow to children attending parochial schools. That Act was amended in committee to incorporate certain restrictions designed to insure that the aid benefitted *children* rather than the *schools* they attended. Those amendments were informally referred to by members of Congress as the "Flemming Amendments" because they were suggested by the President of the NCC, Arthur C. Flemming, in testimony based on this resolution.

The limitations in the resolution, designed to keep the "child-benefit" concept from being completely opened, were as follows:

1. That benefits intended for all children be determined and administered by public agencies . . .
2. That such benefits intended for all children not be conveyed in such a way that religious institutions acquire property or the services of personnel thereby.
3. That such benefits not be used directly or indirectly for the inculcation of religion or the teaching of sectarian doctrine; and
4. That there be no discrimination by race, religion, class or natural origin in the distribution of such benefits.

The relief sought in this brief would seem to meet these criteria, with the possible exception of No. 3, which would stipulate that the sign-language interpreters supplied by the public school district not be involved in the teaching of religion.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Association of Christian Schools International is the largest association of evangelical Christian schools and colleges in the United States. Serving over 550,000 students, ACSI is dedicated to excellence in education that is Christian through the implementation of a Christ-centered philosophy of education. ACSI serves to promote professional excellence of teachers and administrators, a high level of student achievement and the rights of families with religious commitment to pursue biblically-based education for their children without the penalty of

loss of public benefits available to American families generally. ACSI strives to stimulate continuous spiritual and professional growth of school personnel, while defending and providing support for religious schools and the rights of the schools' parents and students in the area of legal/legislative concerns. This case articulates the legitimate need of religious school parents in trying to give their child the best education possible under difficult circumstances.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

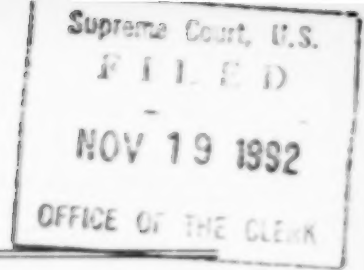
The Church of Jesus Christ of Latter-Day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 8 million with more than 17,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshiping Almighty-God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith No. 11, The Church of Jesus Christ of Latter-day Saints.

Joni and Friends is dedicated to accelerating Christian ministry in the disability community. Founded by

Joni Eareckson Tada fourteen years ago, JAF Ministries works with churches throughout the United States and overseas in programs of evangelism and discipleship, integrating people with disabilities, churches, families and disability organizations. The World Health Organization estimates that at least 10%, or over 550 million people, have a disability, and as a group they are the poorest in the world with the lowest levels of education, employment, health care. The Christian Institute on Disability is one of the most recently developed programs of JAF Ministries, dedicated to scholarship, public policy and analysis on behalf of persons with disabilities.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The congregations of the Synod operate approximately 1,000 elementary and secondary schools situated in most of the states of the United States. The Synod, on behalf of its congregations, schools, and individual members, is concerned with situations in which individuals' freedom to exercise their religious preference and parents' rights to direct the religious upbringing and education of their children are infringed, such as in the instant case.

No. 92-94



In The _____
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband
and wife; JAMES ZOBREST, a minor, by
LARRY and SANDRA ZOBREST, his parents,
Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

This brief is filed by consent of the parties. Letters indicating consent are on file with the Clerk.

The Institute for Justice is a nonprofit, tax-exempt, public interest law center that promotes empowerment of individuals as free and responsible members of society through litigation in support of choice in education, economic liberty, private property rights, and freedom of speech.

This case raises issues of direct and immediate concern to those who seek expanded educational opportunities for youngsters who are disadvantaged either by physical disabilities or socioeconomic circumstances. The Institute for Justice represents economically disadvantaged children who are denied basic educational opportunities in public schools, and parents who seek to gain for their children quality education in a safe and positive environment. The Institute and the individuals we represent believe an essential part of the solution to the crisis of inner city public education is to transfer from government to parents the power to decide how and where to use the public funds allocated for their children's education. Some parents so empowered would send their children to religiously affiliated schools. Since this case speaks directly to the remedial use of public funds in religiously affiliated schools, *amicus curiae* has an urgent interest in the outcome and rule of law established by this case.

STATEMENT OF THE CASE

Amicus curiae adopts petitioners' statement of the case and facts.

SUMMARY OF ARGUMENT

The rule of law established by this case will affect not only the remedial provision of educational services to physically disabled children in religious schools, but also efforts to expand educational opportunities to socio-economically disadvantaged youngsters by allowing parents to use public funds to choose public or private schools for their children. We therefore urge the Court to provide clear guidance for courts and policymakers in fashioning programs that accord with the establishment clause of the First Amendment.

In applying the principles set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1972), we urge the Court to focus on the real world consequences of the challenged program to determine its "primary effect" and whether it impermissibly entangles the state and religion. Where public funds are used to secure educational opportunities in religiously affiliated schools, we believe the appropriate inquiry is whether the challenged program (1) confers preferential treatment upon religiously affiliated schools or merely places such schools on an equal footing with other schools, (2) directly subsidizes religiously affiliated schools or instead conditions receipt of public funds on the independent choices of parents or students, and (3) establishes active state surveillance and interference with

religiously affiliated schools or merely creates such oversight as is reasonably necessary to ensure that the public purpose is fulfilled. These factors would provide clear constitutional guidance in accordance with the purposes of the establishment clause and this Court's precedents, as well as with the compelling interests of equal educational opportunities and parental liberty.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE SHOULD BE APPLIED IN A MANNER THAT DOES NOT UNDULY HAMPER REASONABLE EFFORTS TO EXPAND EDUCATIONAL OPPORTUNITIES AND PARENTAL CHOICE.

Twenty-eight years after *Brown v. Board of Education*, 347 U.S. 483 (1954), established the constitutional imperative of equal educational opportunities, our nation continues its quest to fulfil that promise. The frontiers of this quest today encompass not only overcoming past racial discrimination, but extending opportunities to youngsters who are disadvantaged by physical disabilities or economic circumstances. For youngsters to overcome these disadvantages, access to educational opportunities is absolutely essential.

Ironically, the very opportunities necessary to bridge the gap between the "haves" and "have-nots" in our society often are out of reach to those who need them most. Scholars on both sides of the ideological divide have recognized these educational disparities and the compelling need to redress them. See, e.g., J. Kozol, *Savage*

Inequalities (1991); C. Murray, *Losing Ground* (1984). Private schools can play an important role in expanding educational opportunities to disadvantaged children. See, e.g., P. Hill, et al., *High Schools with Character* (1991); J. Coleman, et al., *High School Achievement* (1982). Likewise, many educational reformers now have concluded that an important part of the solution is giving parents of disadvantaged youngsters greater choice and control over their children's schooling. See, e.g., J. Chubb and T. Moe, *Politics, Markets & America's Schools* (1990).

The challenged program here reflects congressional recognition of the important role of private schools and parental choice in providing educational opportunities to physically disabled children. The statutes in question provide special services on a nondiscriminatory basis to all disabled children, whether their parents have selected for their basic education a public, private, or religiously affiliated school. See *Zobrest v. Catalina Foothills School Dist.*, No. 89-16035 (9th Cir. May 1, 1992) (App. A-5 n.1). Likewise, disabled children for whom a "free appropriate public education" is unavailing in the public schools are entitled to tuition reimbursement at private schools. *School Comm. of the Town of Burlington v. Dep't of Educ. of Massachusetts*, 471 U.S. 359 (1985).

For economically disadvantaged children as well, efforts to expand educational opportunities also encompass private schools, for "public schools enjoy no monopoly on education in low-income areas." *Aguilar v. Felton*, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting). In the past year, legislation in 39 states has been introduced or

initiated to give parents greater choice over their children's schooling. American Legislative Exchange Council, *Legislative Update*, Issue IV. The Wisconsin Supreme Court this spring upheld the Milwaukee Parental Choice Program, which allows up to 1,000 low-income children to use their share of state education funds in private, nonsectarian schools. One justice explained the program's purpose:

The Wisconsin legislature, attuned and attentive to the appalling and seemingly insurmountable problems confronting socio-economically deprived children, has attempted to throw a life preserver to those Milwaukee children caught in the cruel riptide of a school system floundering upon the shoals of poverty, status quo thinking, and despair.

Davis v. Grover, 480 N.W.2d 460, 477 (Wis. 1992) (Ceci, J., concurring).

The principle of separation of church and state should not inadvertently or unnecessarily be pressed into service to defeat these vital secular goals. This is not to suggest that education reform programs should not be drafted carefully to avoid offending the important values reflected in the establishment clause of the First Amendment, but rather that religious liberty and parental liberty do not at all necessarily conflict. Clear guidance from this Court is necessary to harmonize these two important interests; and as we argue below, a common sense application of the establishment clause principles reflected by this Court's precedents provides the appropriate framework for resolving possible conflicts involving state-supported educational opportunities in religiously affiliated schools.

II. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT EDUCATIONAL OPPORTUNITIES ENCOMPASSING RELIGIOUSLY AFFILIATED SCHOOLS WHERE SUCH OPPORTUNITIES ARE NEUTRALLY AVAILABLE AND CONDITIONED UPON INDEPENDENT CHOICES OF PARENTS.

We take as our focus of establishment clause analysis the test set forth in *Lemon v. Kurtzman*, 403 U.S. at 612-613, under which a state program encompassing religiously affiliated schools must satisfy three standards: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion' " (citations omitted). A reasonable application of these standards would uphold the challenged program here as well as other remedial programs that include religiously affiliated schools among the range of educational options.

1. The secular purpose of the program here is undisputed. That concession should not conclude this portion of the establishment clause inquiry, however. Most court decisions devote only cursory attention to the "secular legislative purpose" test, as did the Ninth Circuit below (App. A-8 – A-9). We urge closer attention to this inquiry, for the first and second *Lemon* tests necessarily are interconnected. The importance attached to the state's objectives, and the extent to which the program is closely tailored to achieving those objectives, may as a practical matter determine the program's primary effect.

A program designed to address not merely valid but compelling governmental objectives is not likely to have

as its "primary" real world consequence the advancement or inhibition of religion. Here, as with the "primary effect" test, the inquiry should focus on whether the religiously affiliated institutions themselves are an object of the legislation (such as subsidies limited to private schools), or whether they are among the options available to fulfil an important governmental objective (such as remedial educational opportunities). Compare, e.g., *Lemon*, *id.* (salary supplements to nonpublic school teachers), with *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation assistance).

The program here provides special services to physically disabled youngsters. In so doing, it places disabled youngsters on an equal footing with others with regard to educational opportunities. Moreover, by making these services available regardless of whether the parents choose public, private, or religiously affiliated schools, the program preserves parental liberty to direct the upbringing of their children, a principle deeply embedded in our constitutional tradition. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). A program clearly designed to achieve such important secular objectives is not likely to have more than an incidental effect on religion, and hence the danger of establishing religion is remote.

2A. That the program at issue here¹ neither is intended nor has the primary effect of advancing religion

¹ As a threshold matter, the court of appeals clearly erred in focusing on the individual circumstances of the petitioners. Rather, the court should have directed its inquiry "to the nature and consequences of the program viewed as a whole." *Witters*, 474 U.S. at 492 (Powell, J., concurring) (emphasis in original).

is demonstrated by the program's neutrally available benefits and by the variable of parental choice. These two factors ensure that the values reflected by the establishment clause are protected.

In cases involving the use of public funds in religiously affiliated schools, there arises, of course, no danger of religious coercion, which is a central concern of the establishment clause. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Rather, what is required is for "the government to maintain a course of neutrality . . . between religion and non-religion." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985). The concern in such cases is whether "the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 372. In other words, the inquiry is whether the use of the funds raises "an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, concurring in part and concurring in the judgment).

Applying these principles, this Court repeatedly has held that "direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional." *Aguilar*, 473 U.S. at 422 (O'Connor, J., dissenting). Conversely, "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, because any aid to religion results from the private choices of individual beneficiaries." *Witters*, 474 U.S. at

490-91 (Powell, J., concurring); *accord id.* at 493 (O'Connor, J., concurring in part and concurring in the judgment); *Mueller v. Allen*, 463 U.S. 388 (1983).

This rule is a highly practical one that speaks directly to the concerns of the establishment clause. Programs that provide the same opportunities to students regardless of the schools they attend – such as special services for all handicapped youngsters as here, or state funds made available to public schools or to students opting out of them – steer precisely the neutral course between religion and non-religion charted by the establishment clause. *See, e.g., Meek v. Pittenger*, 421 U.S. 349, 360 (1975); *Bd. of Educ. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236 (1968). Such programs create "no financial incentive for students to undertake sectarian education," nor do they "tend to provide greater or broader benefits for recipients who apply their aid to religious education." *Witters*, 474 U.S. at 488 (majority).

Moreover, "the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not by the State." *Id.* Thus, the choice to use "neutrally available state aid" to pay for education in religiously affiliated schools does not "confer any message of state endorsement of religion." *Id.* at 488-489. As the Court aptly concluded in *Mueller*, 463 U.S. at 400, the "historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."

Applying these principles here, the challenged program satisfies constitutional scrutiny. The court of appeals plainly erred when it stated that the "public aid would not be channeled to the sectarian school through the decision of an individual" (App. A-11). In reality, *no* public funds or services ever cross the threshold of a religiously affiliated school *unless* the parents independently have elected to enroll their children in such a school. The funds and services are available to all youngsters in a class defined without respect to religion. The aid creates no incentive to choose religiously affiliated schools; on the contrary, parents who do so must pay tuition they would not have to pay in the public schools. Under these circumstances, this program quite obviously is "not one of 'the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court.'" *Witters*, 474 U.S. at 488 (citation omitted). Its primary effect is to aid disabled youngsters to obtain appropriate educational opportunities, not to advance religion.

2B. The second half of the "primary effect" test is whether the challenged program inhibits religion. Here the program does not do so, but the decisions below themselves have the perverse primary effect of inhibiting religious liberty.

In this case, the issue is whether the establishment clause compels the government to deny a profoundly deaf youngster services necessary for his education solely because his parents' religious beliefs impel them to choose a religious school. If young James Zobrest attended any other non-religious school, private or public, he would receive these services. Such discrimination

hardly serves the constitutional requirement of neutrality between religion and non-religion.

The Zobrests clearly have the right to choose a religiously affiliated school for their son. *Pierce v. Society of Sisters*, *supra*. Compelling the Zobrests to surrender this right in order to be eligible for a benefit to which they otherwise would be entitled amounts to an unconstitutional condition. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). As Chief Justice Burger observed in *Meek v. Pittenger*, 421 U.S. at 386-387 (concurring in the judgment in part and dissenting in part),

If the consequence of the Court's holding operated only to penalize *institutions* with a religious affiliation, the result would be grievous enough; nothing in the Religion Clauses of the First Amendment permits governmental power to discriminate *against* or affirmatively stifle religions or religious activity. [Citation omitted.] But this holding does more: it penalizes *children* – children who have the misfortune to have to cope with the learning process under extraordinary heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise.

The melancholy consequence . . . is to force the parent to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forego the opportunity for his child to learn to cope with – or

overcome - serious congenital learning handicaps, through remedial assistance financed by his taxes.

[Emphasis in original.]

The establishment clause compels no such harsh result. As the Court emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947), the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access to school facilities). Hence with respect to the provision of transportation services to all schoolchildren, the Court declared,

While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Everson, 330 U.S. at 16. The same result should obtain here: far from prohibiting the nondiscriminatory provision of remedial services to all youngsters regardless of religious belief as the challenged program here does, the First Amendment is designed to ensure precisely the neutrality toward religion the program reflects.

3. The third test of *Lemon*, 403 U.S. at 621, requires assurance that "comprehensive measures of surveillance

and controls will not follow" public funds or services into religiously affiliated schools, and that the challenged program will not "require a permanent and pervasive state presence" in the schools. *Aguilar*, 473 U.S. at 413. These standards are necessary not only to prevent excessive administrative entanglement between the state and religiously affiliated schools, but also to preserve the independence and integrity of the schools.

Applying these standards in common sense fashion should entail examining whether the program imposes no more than the minimal standards and oversight necessary to ensure that public objectives are satisfied, without any continuing day-to-day presence in the schools or influence over the school's internal affairs. For the reasons described in Judge Tang's dissenting opinion in the court of appeals (App. A-27 - A-32), we agree the program as administered does not excessively entangle the state with religious institutions.

CONCLUSION

As Judge Tang declared in his dissenting opinion, the court of appeals ruling below "exalt[s] form over substance at the expense of handicapped children" (App. A-19). Clear guidance on establishment clause standards is necessary to foster efforts to expand precious educational opportunities for disadvantaged children. Where such efforts include the provision of funds or services that children may use in religiously affiliated schools, such programs satisfy establishment clause requirements if they (1) do not discriminate in favor of religiously

affiliated schools, (2) depend upon the independent choices of parents, and (3) do not impose the state into the day-to-day operations or internal affairs of the school. In the interest of equal educational opportunities for America's most disadvantaged children. *Amicus curiae* urges this Court to affirm these standards and reverse the ruling below.

Respectfully submitted,

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DATE: November 19, 1992

BEST AVAILABLE COPY

Question Presented:

Whether 34 C.F.R. § 76.532(a) prohibits the government from paying for the sign language interpreter requested by the Petitioners.

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INTEREST OF *AMICI CURIAE*

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and separation of church and state in education.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including the separation of church and state as well as religious freedom.

People For recognizes the difficult and controversial nature of the constitutional issues that many of the parties and *amici* have sought to raise in this case, which could have major implications in many other cases as well. Particularly in light of the significance of these issues, it is important that this Court carefully take into account the prudential principles with respect to avoiding premature or unnecessary rulings on such issues. As explained *infra*, the particular dispute in this case appears to be governed by a federal regulation prohibiting the type of aid at issue even though the applicability and constitutionality of the regulation were not specifically decided by the courts below. People For accordingly has requested leave to file this *amicus* brief and suggests that the Court affirm the judgment below based on the regulation or, in the alternative, remand for reconsideration in light of the federal regulation.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private secondary schools throughout the United States. One of its purposes is to act as a spokesman for secondary school administrators in the important issues of educational policy in the United States.

STATEMENT OF THE CASE

The federal government administers aid to handicapped students through the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (1988) (formerly "Education of the Handicapped Act" or "EHA"). Federal regulations promulgated under IDEA prohibit using a "grant or subgrant to pay for . . . religious worship, instruction, or proselytization," or to pay for "equipment or supplies" that are used for religious worship and instruction. 34 C.F.R. § 76.532(a) (1992).

James Zobrest is a deaf student whose parents enrolled him in the pervasively sectarian Salpointe Catholic High School in 1988. His parents sought to have Catalina Foothills School District provide, through an IDEA grant, a sign language interpreter to assist him in his classes and religious instruction at Salpointe. When the School District refused, the Zobrests brought this suit seeking to require that an interpreter be provided by IDEA funds.

SUMMARY OF THE ARGUMENT

In their haste to reach the intriguing and difficult constitutional questions that could be posed by this case, the parties and the courts below neglected a dispositive issue: 34 C.F.R. § 76.532(a) (1992) prohibits the aid sought by the Petitioners.

The only court that has decided whether this federal regulation prohibits the government from paying for sign language interpreters at parochial schools held that such aid was impermissible. *Goodall v. Stafford County School Bd.*, 930 F.2d 363, 369 (4th Cir. 1991). Because 34 C.F.R. § 76.532(a) provides an independent, adequate, and dispositive basis for affirming the judgment of the Ninth Circuit, there is no need for this Court to reach at this time the constitutional issues urged by Petitioners. In the event that disposition of the case on the basis of the regulation would require resolution of any issue as to the validity of the regulation or its applicability here, the proper course would be to remand the case to the court below for further consideration of such issues.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION SHOULD BE AFFIRMED BECAUSE FEDERAL REGULATION 34 C.F.R. § 76.532(a) PROHIBITS RESPONDENT CATALINA FOOTHILLS SCHOOL DISTRICT FROM PAYING FOR SIGN LANGUAGE INTERPRETATION FOR RELIGIOUS WORSHIP OR INSTRUCTION.

Because this Court "reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), its review of the decision below is not limited to the grounds on which the lower courts' decisions rest.¹ Although the courts below did not address the applicability of 34 C.F.R. § 76.532(a),² that regulation effectively disposes of this case. The Ninth Circuit's judgment precluding use of federal grant money to pay for sign language interpretation for religious instruction should, therefore, be affirmed on this independent ground, and the Court need not and should not reach the constitutional issues raised by the parties.

¹ See also *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements in opinions."); *J.E. Riley Inv. Co.*, 311 U.S. 55, 59 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action.").

² Judge Tang's dissent in the Ninth Circuit explicitly refrained from deciding the applicability of the regulation. "I do not address either the applicability or constitutionality in this context of the federal prohibition on the use of EHA funds for religious 'worship, instruction, or proselytization.' 34 C.F.R. § 76.532 (1991)." *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d 1190, 1205 n.2 (9th Cir. 1992) (Tang, J. dissenting).

A. Federal Regulation 34 C.F.R. § 76.532(a) Prohibits States And Subgrantees From Paying For Religious Instruction Or For Equipment Furthering Such Instruction.

For more than twelve years, 34 C.F.R. § 76.532(a) has squarely prohibited use of IDEA (or, formerly, EHA) funds to pay for religious instruction or for equipment used in furtherance of religious instruction. The regulation provides:

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section

34 C.F.R. § 76.532(a).³ Thus, in relevant part, the regulation prohibits using a "grant or subgrant to pay for . . . religious worship, instruction, or proselytization" or to pay for equipment used for religious worship, instruction, or proselytization. There is no assertion by any party or *amicus* that the regulation was improperly promulgated or that it is otherwise invalid.

There is no dispute that Catalina Foothills School District is a duly authorized "subgrantee" within the meaning of § 76.532(a). There is also no dispute that Salpointe Catholic High School is a "pervasively religious" institution that actively

³ Section 76.532(a) was promulgated on April 3, 1980 as 45 C.F.R. § 100b. In November 1980, upon the creation of the Department of Education, 45 C.F.R. § 100b was recodified as 34 C.F.R. § 76.

engages in religious instruction and worship as a part of its mission. Pet. Br. at 10; *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d at 1192.⁴ Nor is there room for dispute that the sign language interpreter sought by the Zobrests would be used in connection with such religious instruction and worship. See J.A. 90-92. The only question on which application of 34 C.F.R. § 76.532(a) can hinge, therefore, is whether sign language interpretation is either "instruction" or equipment used for instruction within the meaning of the regulation.

⁴ Salpointe High is a private Roman Catholic school, operated by the Carmelite Order of the Catholic Church. Salpointe is a pervasively religious institution; religious themes permeate the classroom. According to the parties' stipulation of facts, '[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe.' Salpointe 'encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.' Religion is a required subject for students enrolled at Salpointe, and the students are strongly encouraged to attend the Mass celebrated there each morning. As a result, a sign language interpreter would be called upon to translate religious precepts and beliefs during the course of James's education.

Zobrest v. Catalina Foothills School Dist., 963 F.2d at 1192.

B. Sign Language Interpreters Either Engage In Instruction Or Act As Equipment In Furtherance Of Instruction Within The Meaning Of 34 C.F.R. § 76.532(a).

Regulation 34 C.F.R. § 76.532(a) has been held to prohibit IDEA grantees from paying sign language interpreters at religious schools by the only court that has decided the question. *Goodall v. Stafford County School Bd.*, 930 F.2d 363 (4th Cir.), *cert. denied*, 112 S.Ct. 188 (1991). In a factual setting virtually identical to this case, the Fourth Circuit decided, *inter alia*, that the regulation prohibited the state from paying for a sign language interpreter at a fundamentalist Christian school. "The [payment] of a cued speech interpreter to Fredericksburg Christian School would fall squarely within the regulation's prohibition." *Goodall*, 930 F.2d at 369.

Although the Fourth Circuit did not specify whether the interpreter provided instruction or simply functioned as equipment used for instruction, it held that the regulation applied. The holding could have rested on either clause of the regulation.

Certainly the interpreter would be providing "instruction," even when the content of the instruction originated with others. There can be no doubt that an IDEA grantee would be prohibited from paying a teacher to go to Salpointe High and read religious sermons prepared by the local clergy, even if the teacher read those sermons verbatim. The fact that the publicly paid teacher might accurately repeat the sermon's words – without adding or subtracting anything from the text – would not change the fact that the assembled students would be receiving religious instruction. Thus the Petitioners' suggestion

that the sign language interpreter does not add to or subtract from the teachers' words is simply beside the point. *See, e.g.*, Pet. Br. at 20. The relevant issue is not whether an interpreter – or a hypothetical teacher – is the *originator* of the message being conveyed, but whether the students receive "religious instruction" when a teacher or an interpreter conveys a religious message. Just as a teacher who reads a sermon written by another is providing religious instruction, so is a sign interpreter who translates that same sermon. The regulation lays down a blanket prohibition on IDEA funding of all religious instruction.

Seeking to avoid the charge that they are requesting state-funded religious instruction, the Petitioners attempt to minimize the role of the interpreter. They describe an interpreter as "perform[ing] a mechanical function . . .," Pet. Br. at 20, and assert that "[h]is function is mechanical . . ." *Id.* at 17. The Petitioners' complaint similarly referred to an interpreter as "a neutral conduit, akin to a hearing aid . . ." J.A. at 21.

But in this attempt to minimize the interpreter's role, the Petitioners merely shift attention from the regulation's proscription of "instruction" (§ 76.532(a)(1)) to its prescription of equipment used for such instruction (§ 76.532(a)(2)). In fact, the Petitioners, the Solicitor General, and Judge Tang's dissent below all acknowledge that there is no material difference between a sign language interpreter and the mechanical equipment that would run afoul of § 76.532(a)(2). The Solicitor General, for example, stresses that the interpreter's function is no different from that of other equipment for the hearing impaired. "At bottom, an interpreter is analytically indistinguish-

able from a hearing aid" S.G. Br. at 21 (emphasis added). Judge Tang's dissent below similarly acknowledges that a "sign language interpreter performs a mechanical service," and describes an interpreter as functionally analogous to "eyeglasses," a "hearing aid," a "machine," and "mechanical equipment." *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d at 1201, 1202 (Tang, J. dissenting). Thus there is no dispute that sign language interpreters perform the same function as equipment, as that term is understood in ordinary speech.

The IDEA statute itself provides additional justification for treating interpreters as serving the functional role of equipment. The statute offers a useful, broad, and open-ended catalogue of examples of equipment, including "sensory, and other technological aids and devices" 20 U.S.C. § 1401(5) (1988). The very function of an interpreter is, of course, to provide a sensory aid to the hearing impaired. Therefore, unless "equipment" is read narrowly and without regard to its function in the regulation, § 76.532(a)(2) proscribes the use of sign language interpreters to assist with religious instruction.

In sum, the argument that interpreters do not provide "instruction" because they perform a "mechanical function," but that they are not equipment because they are human, is no more than a semantic shell game. The regulation as a whole prohibits the government from paying for religious instruction or for aids used to further that instruction. Regardless of how one chooses to characterize the interpreter's role, the regulation prohibits the government from paying for the activity.

C. The Solicitor General Fails To Show Any Reason Why § 76.532(a) Does Not Apply.

The Solicitor General, as well as other amici, suggest that § 76.532(a) merely tracks the meaning of the Establishment Clause of the First Amendment. "That regulation does nothing more than implement the Secretary's understanding of the requirements of the Establishment Clause" S.G. Br. at 23.⁵ That assertion is offered, however, without any substantiation. The regulation itself does not state that it is designed merely to incorporate the prohibitions of the Establishment Clause. No evidence is offered that any Secretary of Education ever said that such was the purpose of the regulation. No judicial finding to that effect is or can be invoked.⁶

Nor does the language of the regulation support the assertion that it is mere surplusage. The regulation does not track the language of the Establishment Clause, nor does it refer to that Clause, or to the First Amendment. Surely, if the purpose was for the regulation merely to duplicate the Establishment Clause, this easily could have been made clear.

Instead, the regulation states that IDEA funding may not be used to help provide religious instruction without reference to the specific dictates of the Establishment Clause. The regulation should, accordingly, be applied in this case on

⁵ See also Brief *Amicus Curiae* of Christian Legal Society *et al.* at 7 n.3. "That regulation, however, is best understood as a regulatory embodiment of the requirements of the Establishment Clause."

⁶ The government cannot, of course, alter the meaning of the regulation in order to gain advantage in litigation. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

its own merits and authority, and with the full respect accorded to a federal regulation duly promulgated by the appropriate agency. See *Atkins v. Rivera*, 477 U.S. 154, 162 (1986); *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

D. This Court Should Not Reach Out Unnecessarily To Decide The Constitutional Issues Raised By The Parties And Amici.

Ignoring the possible applicability of the regulation, the parties and amici are prodding this Court to decide constitutional questions that need not be addressed. It has long been this Court's practice, however, not to decide constitutional issues when there is an adequate non-constitutional legal ground for resolving the dispute before it. The venerable rule is that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). Indeed, it is a "cardinal rule" that courts should "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (quoting *Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). The Court "has rigidly adhered" to the rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Rust v. Sullivan*, 111 S.Ct. 1759, 1789 (O'Connor, J. dissenting) (also quoting *Liverpool*).

Although a question might be raised as to the constitutionality of 34 C.F.R. § 76.532(a), that is not the question upon which the Court granted *certiorari*, nor is it an issue that has

been briefed by the parties. At most, the constitutionality of the regulation is an issue that might be addressed should the Court remand for consideration of issues relative to the regulation. But, at this point this Court should not reach out unnecessarily to decide the constitutional issues that could be raised by this case.⁷

⁷ In the event of a remand, it might be well for the lower court to consider whether there is independent state law that affects the application of IDEA grants. As the court in *Goodall* noted, IDEA and its regulations incorporate, to some extent, state law. 930 F.2d at 365-66. Although the issue was not resolved below, the Ninth Circuit opinion recognized that the Deputy County Attorney and the Arizona Attorney General advised that furnishing an interpreter to Zobrest would violate state constitutional prohibitions. See *Zobrest*, 963 F.2d at 1192. The Arizona Attorney General had in fact advised that "a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates . . . art. 11, § 12 of the Arizona Constitution." J.A. 9 (emphasis added).

CONCLUSION

Because the applicable federal regulation prohibits use of IDEA funds for religious instruction or related equipment, and because even the Petitioners, the Solicitor General, and other amici have acknowledged that a sign language interpreter acts in the same capacity as equipment for the hearing impaired, the federal regulation controls the outcome of this case. *Amici* National PEARL *et al.* respectfully urge this Court to affirm the judgment of the Ninth Circuit or, in the alternative, to remand for further proceeding in light of the applicable federal regulation.

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December 18, 1992

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American Association of University Women
American Ethical Union
American Humanist Association
Americans for Religious Liberty
Central Conference of American Rabbis
Committee for Public Education and Religious Liberty
Council for Democratic and Secular Humanism
Michigan Council about Parochialism
Monroe Citizens for Public Education and Religious Liberty
National Association of Laity (Catholic)
National Center for Science Education
National Council of Jewish Women
National Education Association
National PTA
National Service Conference of the American Ethical Union
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In the

Supreme Court of the United States

October Term, 1992

Larry Zobrest, Sandra Zobrest, James Zobrest,
by Larry and Sandra Zobrest, his parents,
Petitioners,

v.

Catalina Foothills School District,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF RESPONDENT

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No. 92-94

In the
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF
NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF RESPONDENT

This brief is filed with consent of both
parties. Letters of consent are on file with
the Clerk of this Court.

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief of Respondent.

ARGUMENT

I. Introduction

Legal scholars, including members of this Court, are not of one mind as to the preferred mode of analysis in establishment of religion cases. However, the tripartite test in Lemon

v. Kurtzman, 403 U.S. 402 (1971), raising the question of the constitutionality of providing salary supplements and reimbursements to teachers in sectarian schools, has been followed by the Court in every so-called "parochial" (aid to parochial schools) case since that time. Although not always easy to follow, through this line of cases runs one consistent thread in the decisions of both the majority and the dissenters: direct aid to religious activities is unconstitutional. Amicus submits that the instant case presents a clear example of such direct aid.

In establishment of religion cases other than those involving parochial, the Court has applied a variety of tests. In Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld prayer at legislative sessions based on the historical underpinnings of that practice. The Court employed a "coercion" test in finding a school sponsored prayer at a middle school graduation unconstitutional in the case

of Lee v. Weisman, 112 S.Ct. 2649 (1992). See also County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086 (1989) (Kennedy, J. dissenting). Some members of the Court have advocated an "endorsement" standard. Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J. concurring). See also Lee v. Weisman, 112 S.Ct. at 2667 (Souter, J. concurring). But regardless of which analytical road one follows, the journey in this case will reach the same end -- a school district cannot pay a public employee to serve as a deaf interpreter during religious worship and religious instruction without unconstitutionally establishing religion.

II. The facts in this case present a more egregious case of establishment of religion than those in Lemon v. Kurtzman and other parochial cases. The aid here has the "primary effect" of advancing religion even under the analysis in the dissents in those cases.

Amicus urges this Court to retain the test established in Lemon v. Kurtzman. Although fine lines have been drawn by the

Court in ruling on various types of aid, schools across the land have lived with those lines, in some cases for as long as 20 years, and it would be unfortunate and unsettling to send a message that the Court is reevaluating all the prior parochial decisions. Other standards may have been easier to apply had they been adopted at the outset, but established precedents should not be overturned merely to tidy up constitutional analysis in this area. In the words of Justice Holmes, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Moreover, it is highly likely that both the majority and the dissent in the parochial cases decided under Lemon would have reached their respective conclusions even under a different analytical scheme.

Both the majority and dissenting opinions in this Court's parochial cases lead to the clear conclusion that the aid in this case is

unconstitutional. On one hand, the majority opinions in these cases have upheld the constitutionality of general financial assistance provided directly to students but have approved specialized aid only when it is provided off private school premises or if it is incapable of being used for religious purposes. On the other hand, the dissents have indicated that parochial aid should be overturned only where the record contains evidence that the aid supports religious activities directly.

Prior to Lemon a number of cases upheld certain forms of indirect parochial aid, which are distinguishable from the aid at issue here. Although the decisions have overturned funding schemes that provide unrestricted aid to religious institutions, they have upheld programs of general aid directly to students (or their parents) or specific aid to students (or their parents) that is not capable of diversion to religious purposes. Everson v.

Board of Education of Ewing, 330 U.S. 1 (1947), upheld a program to provide transportation to private school students; Board of Education v. Allen, 392 U.S. 236 (1968), upheld a program providing textbooks to private school students.

After Lemon, the Court in Mueller v. Allen, 463 U.S. 388 (1983), upheld monetary assistance directly to parents or students in the form of a tax deduction for education expenses for parents of students in elementary and secondary schools, and in Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), upheld vocational training assistance provided to a blind student studying to become a pastor. The Court in Wolman v. Walter, 433 U.S. 229 (1977), upheld non-monetary assistance (therapeutic, guidance, and remedial services) to private school students on public school grounds. The Court also upheld certain services provided on private school premises, on the grounds that

they raise no possibility of transmitting sectarian views (diagnostic speech and hearing services; diagnostic psychological services and textbooks provided to students at the request of the private school) or are incapable of diversion by the private school to religious purposes (testing and scoring program to assure that state educational standards are met).

The aid in this case does not fall into any of the categories which the Court has upheld. The important distinction here is that the assistance provided by the State is not restricted to secular activities and is not the type of generic aid that was the subject of Witters and Mueller.

Before turning to an analysis of types of aid held unconstitutional, let us examine the aid which is the subject of the instant case. The Individuals with Disabilities Education Act (IDEA, formerly called the Education for All Handicapped Children Act), 20 U.S.C. 1401

et seq., requires that students with disabilities enrolled in private schools be provided special education and "related services." 1413(a)(4)(A). Amicus agrees with the United States' argument in its brief in this case that the IDEA does not necessarily violate the Establishment Clause. Brief of United States at 11, 14, 16, 17, Zobrest v. Catalina Foothills School District, (No. 92-94) (U.S. cert. granted, Oct. 5, 1992). The statute itself does not set out the manner in which the equitable participation of private school students is to be afforded, therefore, the constitutionality of the statute itself is not at issue here. The question to be addressed here is whether, under the specific facts of this case, the Catalina School District would establish religion if it acceded to the Zobrest request and paid a public employee to translate religious worship and religious education programs at Salpointe

(the Catholic school in which the Zobrest child is enrolled.)

In Lemon v. Kurtzman the Court cited Board of Education v. Allen as the source of the first prong of its tripartite test, requiring enactments to have a secular purpose and of the second prong, proscribing enactments that have a "primary effect" of advancing or inhibiting religion. In Lemon the Court added a third prong prohibiting government "entanglement" with religion. However, the Court can decide this case without resort to this prong which has been the subject of a great deal of contention in the Court over the years. Amicus submits that the aid at issue in this case cannot pass muster under the first two prongs of the Lemon precursors, the dissent in Lemon or the majority or dissenting opinions in the parochial cases which follow Lemon.

In Allen the Court upheld a statute requiring school districts to provide

textbooks to students in private schools. The private schools, upon receiving a request from a parent, notified the school district of the textbook chosen by the private school. In upholding the statute, the Court noted that it had no evidence before it to indicate that the textbooks would be used to support religion.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. [Emphasis supplied.]

392 U.S. at 247. See also Everson, 330 U.S. 1 (using the same standard in upholding a statutory requirement that school districts provide transportation to private school students).

In the instant case, however, the parties stipulated that "the two functions of secular education and advancement of religious values

or beliefs are inextricably intertwined throughout (sic) the operations of Salpointe. [Emphasis supplied.]" See Joint Appendix at 92.

This conceded "intertwining" requires invalidation of the aid at issue here even under the dissent's analysis in Lemon. Justice White's dissent faulted the majority for its refusal to trust private school teachers to uphold their pledge to teach only secular matter and, consequently, holding the statute unconstitutional because it requires a school district either to risk the unconstitutional "effect" of publicly funded private school teachers slipping religious teachings into secular courses or to "entangle" government with religion through efforts to monitor the teachers. Justice White opined that the Court should not have assumed without a record of abuse by the private school teachers.

At trial under this complaint, evidence showing such a blend [of religious teaching with secular subjects] in a course supported by state funds would appear to be admissible and, if credited, would establish financing of religious instruction by the State.

403 U.S. at 671.

The Stipulation between the parties in this case shows such a "blend" of religious and secular teachings at Salpointe.

25. Teachers at Salpointe sign a Faculty Employment Agreement which states that 'Religious programs are of primary importance in Catholic educational institutions. They are not separate from the academic and extracurricular programs, but are instead interwoven with them and each is believed to promote the other.

Joint Appendix at 90.

26. The Faculty Employment Agreement requires teachers to not only accept, but also to promote, the relationship among the religious, the academic and the extracurricular.

Joint Appendix at 91.

Justice White's dissent in Lemon further noted:

[The lower courts do not reach] the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would to that extent be unconstitutional.

403 U.S. at 670, n. 2.

The parties' Stipulation shows that the proof of which Justice White speaks in Lemon has been made in this case.

22. Salpointe has as its distinguishing purpose the inculcation in its students of the faith and morals of the Roman Catholic Church.

23. Religion is among the required subjects at Salpointe. All students are provided formal instruction in the Roman Catholic faith.

Joint Appendix at 90.

Stipulation 35 provides that interpreters are forbidden by their code of ethics to "edit in any way communications to and from the deaf person who he or she serves as a sign language interpreter." Joint Appendix at 93.

Petitioners and the United States argue that the accuracy of the translation takes this case out of the rubric of cases like Grand Rapids v. Ball, 473 U.S. 373 (1975), U.S. Brief at 12, Petitioner's Brief at 20. Apparently, they believe that if the interpreters translate exactly what is presented, the translation becomes less religious. If this were a situation like Lemon where funds were earmarked solely for teachers who instruct in secular courses and if the proof in this case indicated that none of the courses included religious material, Stipulation 35 might be relevant. But the parties have stipulated that the interpreters are used to interpret religious material, so an accurate translation would necessarily transmit a religious message.

The aid similarly fails constitutional muster under the analysis in the post-Lemon parochial dissents. In PEARL v. Nyquist, 413 U.S. 756 (1973), Justice White's dissent

(Burger, C.J. and Rehnquist, J. concurring) believed that the "tax forgiveness" statute at issue should not have been held unconstitutional on its face. The dissent criticized the majority's emphasis on a particular type of parochial school, because many such schools are not restricted to students of a particular religion and do not condition attendance on religious study. 413 U.S. at 822. In the present case, however, the parties have stipulated that the school requires Catholic religious study. Joint Appendix at 90

Justice Rehnquist, in another dissenting opinion in Nyquist, (Burger, C.J. and White, J. concurring) could find no distinction between the general aid in the form of a "tax abstention" measure at issue and the aid to parents in Everson and Board of Education v. Allen. 413 U.S. at 800. The case at bar, of course, involves aid directly to religious instruction.

In Levitt v. PEARL, 413 U.S. 472 (1973), this Court held unconstitutional a statute reimbursing private schools for their teachers' time in preparing and grading tests. Justice White dissented without opinion, presumably for the same reasons announced in the dissents in Nyquist and Lemon. The majority assumed that the funding was used to support teacher-prepared tests which might have included religious material despite the absence of any facts on the record to support that conclusion. However, as noted above, in the instant case, the parties stipulated to the fact that the interpreter would be used for religious worship and instruction.

Finally, in Grand Rapids v. Ball this Court overturned both a program which funded public school teachers to instruct in religious schools and one that funded religious school teachers to teach in religious schools. In Felton v. Aguilar, 473 U.S. 402 (1985), decided the same day as Grand

Rapids, the Court overturned public funding of public school teacher instruction in private schools on the ground that the monitoring system to assure that the teachers do not inculcate religion would result in excessive "entanglement" with religion. Justice O'Connor dissented in Felton because only public school teachers were used and dissented in Grand Rapids only as to the programs that used public school teachers. Justice O'Connor noted that nothing in the record supported a conclusion that public school teachers would proselytize the students, while there was both a real and perceived "effect" of advancing religion in funding regular private school employees accustomed to integrating religion into the entire curriculum. Justice Rehnquist dissented in both cases because of the lack of evidence of religious inculcation. Justice Rehnquist pointed out that the majority did a disservice to public school teachers by assuming they would be "eager inculcators of

religious dogma." 473 U.S. at 401. He also refused to accept the "Catch 22 paradox" that in attempting to prevent teachers from advancing religion, the government would become "entangled" with religion. 473 U.S. at 419. Justice White also dissented for the reasons set forth in his dissent in Lemon. Again, in the case at bar there is ample evidence that the funds are going directly from the state to a religious activity.

Amicus engages in this somewhat lengthy analysis of dissents in this Court's parochial decisions in order to emphasize that nothing in either the majority opinions or the dissents supports a contention that direct aid to religious activities in parochial schools could under any circumstances pass constitutional muster. The "primary effect" of the expenditure of public funds to pay a public employee to interpret religious messages for a young student is to support religion.

Petitioners and the United States argue that Grand Rapids v. Ball does not apply here because the state is funding an interpreter rather than a teacher and there is no "perception" of government support of religion or a "symbolic union" of church and state. Brief of Petitioners at 2, 12 and Brief of U.S. at 9. The relationship between church and state in the case at bar is even closer than that in the cases cited above. There is not merely a perception of support of religion, it is a reality. State funds are being funneled directly into religious services and religious education.

III. A hearing aid is distinguishable, in fact, from an interpreter for the deaf but either form of aid is unconstitutional if provided at public expense for use in religious worship and instruction.

The dissenting judge in the decision below and the brief of the United States argue that interpreters are no different from hearing aids. Amicus submits that there is a

significant factual distinction between a public employee acting as an interpreter for the deaf and a piece of equipment such as a hearing aid. American Sign Language is as much a language as English, French or Russian and a signer is more analogous to a foreign language translator than to a hearing aid. Anyone who has compared different translations of classical works such as those by Aeschylus and Euripides, understands that each translation is unique without necessarily being dishonest to the intent of the author. So it is with interpreters for the deaf.

A hearing aid is static, acting merely as a mechanical sound amplifier, while a deaf interpreter translates from English to sign language. Deaf interpreters are dynamic, each having his or her own individuality of signing with the use of both hand signals and facial expressions. Different cultures have also developed their own distinctive sign languages. For an interesting discussion of

how deaf people communicate, see R. Wolkomir "American Sign Language: 'It's not mouth stuff -- it's brain stuff'." Smithsonian, Vol. 23 at 30 (July 1992).

Factual differences aside, for the purpose of the establishment clause, a deaf interpreter and a hearing aid are alike because government provision of either in a religious class is unconstitutional.¹

In Meek v. Pittenger, 421 U.S. 349 (1975), this Court overturned a statute which funded instructional material and equipment to be used predominantly in religious schools. Petitioners cite Meek for the proposition that the Court should look at the totality of the aid to institutions under the IDEA, rather than to the specific service in question. Petitioners' Brief at 19. However, the amount

¹ Furthermore, although school districts may be required to provide interpreters in some cases, school districts are not required, under the IDEA, to provide hearing aids to special education students because they are considered to be "personal items." 211:19 EHLR (April 4, 1978).

of funding or number of recipients should not be the inquiry in a case, like the instant case, where there are facts on the record to show exactly where the assistance is going.

Justice Rehnquist and Justice White dissented in Meek on the ground that the majority's holding that the "primary effect" of the statute was to advance religion, was based on the number of religious schools funded rather on the use of the funds. The dissent found more persuasive the rationale of the district court which had upheld the statute except to the extent that it "permit[ted] the loan of instructional equipment which can be easily diverted to a religious use." 421 U.S. at 389, n. 1, citing 374 F.Supp. 639, 661 (E.D. Pa. 1974). For the same reasons, Justices White and Rehnquist also dissented in Wolman v. Walter, where the Court overturned an Ohio statute authorizing public funds to purchase instructional

materials and equipment for use of students in religious schools.

The United States in its brief compares the provision of a sign language interpreter to the provision of public health services to students in sectarian schools validated by the Court in Wolman. U.S. Brief at 20. However, it should be noted that Wolman also found unconstitutional funding of equipment that could be used for religious purposes. As noted above, even the dissent agreed that it is the use of the equipment that is relevant.

Whether or not one finds a parallel between interpreters and hearing aids, it would appear that when public funds are used to support a public employee or to pay for a piece of equipment in order to communicate religious messages -- that expenditure is unconstitutional under both the majority and dissenting analyses in Pittenger and Wolman.

IV. The direct aid to religious worship and instruction at issue here, is distinguishable from the general aid to students and parents at issue in Witters and Mueller.

The dissent below, and briefs of Petitioners and the U.S. agreed, opined that the type of "general aid" involved here has such a minimal effect on religious institutions, that it cannot be said to have a primary effect of establishing religion. The aid is problematic, however, not because of the amount of money involved or the financial benefit to the religious institution -- but because of the religious significance of the aid in support of sectarian religion. When government funds religious worship and religious instruction directly, the government establishes religion regardless of the amount of money expended or of the financial benefit to a particular religious institution.

This Court's decisions upholding grant programs directly to students or parents of students are distinguishable from this case.

Both Hunt v. McNair, 413 U.S. 734 (1973), and Tilton v. Richardson, 403 U.S. 672 (1971), involved assistance to colleges for construction of academic facilities except those which are used for sectarian instruction or religious worship. In Hunt the assistance was in the form of state revenue bonds and in Tilton the aid was through federal grants. On the contrary, there is no restriction in the IDEA as to use of funds for sectarian instruction or religious worship and, in fact, in this case it is undisputed that the service is to be provided in both sectarian instruction and religious worship.

The dissent and briefs of Petitioner and the U.S. cite Mueller v. Allen, 463 U.S. 388 (1983), in support of their contention that the aid here is constitutional because it results from private choices. Mueller involved a tax deduction for educational expenses for both private and public elementary and secondary schools. The Court

refused to engage in an "empirical inquiry" as to the relative number of public and private schools which are benefitted by the law because, on its face, it assisted all parents of school-age children. And, although the aid may ultimately have an "economic effect comparable to that of aid given directly to the schools, under Minnesota's arrangement the public funds become available only as a result of numerous private choices of individual parents." 463 U.S. at 400. In the instant case we need not engage in speculation as to the use of the assistance at issue, because the parties stipulated to the fact that the assistance goes directly from the state to a religious activity.

The U.S. cites Widmar v. Vincent, 454 U.S. 263 (1981), for the proposition that if general benefits to religion are unconstitutional, a city would be precluded from providing fire and police protection or repairing its public sidewalks. U.S. Brief at

19. That example is not apt here. In this case, secular state funds are used in the direct support of religious exercises and education programs whereas sidewalks and fire protection are peripheral to the religious mission of the school and of an entirely different character from the service at issue here.

The dissent and briefs of Petitioners and the U.S. also cite Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), in support of their conclusion that even if "a small portion of the state's funds ultimately flowed to a religious institution [that] did not undercut the laudatory secular purpose of the law." As discussed above, the dollar amount of aid or number of persons or institutions served is not relevant. The pivotal concern is the type of aid and the activity to which the aid flows.

Witters involved a vocational education financial assistance program for persons with

disabilities. The assistance was provided directly to students who were free to use it at the institution of their choice. This Court held that the fact that the funds are ultimately used to pay tuition at a religious school is the direct result of the independent choice of the student and not attributable to the State. Although the Court, citing Grand Rapids v. Ball, agreed that generally "aid to a religious institution unrestricted in its potential uses . . . [is] clearly unconstitutional," since the aid at issue in Witters went directly to the student the fact that the aid was unrestricted was not constitutionally problematic. The relationship between the state and the student was secular. Although the next transaction, between the student and the school, was not entirely secular, the government was no longer a party to the transaction. In this case there are no "middle men." The aid goes

directly from the state to a religious activity.

Petitioners suggest in their brief that it is inappropriate in Constitutional analysis to "split hairs." Petitioner's Brief at 23. What may appear to one as "splitting hairs" is to another a serious deprivation of rights. Line drawing is an essential part of First Amendment analysis. In any of the cases cited by Petitioners a slight change in facts would likely have changed the result. Had the state conditioned funding in Witters or the deduction in Mueller on attendance at religious schools, the Court would have at least examined whether the assistance was restricted to secular uses. If the assistance in Witters or Mueller had gone directly to the school for use in religious instruction and worship, the Court would probably have found that use unconstitutional. Had the general assistance to private schools in Tilton and

Hunt been unrestricted, the constitutional conclusion may have been different.

The case at bar presents neither a case of financial aid directly to a student nor a case of assistance to a private school for secular purposes. Although the service if examined out of context may be secular, the service is used by the state for pervasively sectarian purposes. Unlike Witters, a "reasonable observer is likely to draw from the facts [in this case] an inference that the State itself is endorsing a religious practice or belief." Witters, 474 U.S. at 494 (O'Connor, J. concurring).

- V. The free exercise of religion clause does not require a school district to violate the law (in this case the establishment of religion clause) in order to accommodate the religious beliefs of a parent. Further, the state does not "inhibit" religion by refusing to provide assistance to sectarian worship and instruction.

Petitioners argued below that since Respondent would have provided a deaf interpreter to the child had he been enrolled

in a public school or a private non-sectarian school, his free exercise of religion rights have been infringed. Petitioners use a related argument in their brief in this Court, which arises out of the second prong of the Lemon test, that the denial of the service has a "primary effect of inhibiting religion." Brief of Petitioners at 22.

A number of this Court's parochial decisions result in a similar "inhibition." In Meek v. Pittenger students in public and private secular school were afforded auxiliary services including counseling, testing, psychological services, speech and hearing therapy while students in religious schools were not entitled to such services. In Meek and Wolman v. Walter the students in parochial schools would have been supplied instructional equipment and materials had they been enrolled in public or private secular schools. In Grand Rapids v. Ball and Aguilar v. Felton parochial school students could not receive

supplemental educational services in their school, while public school students were afforded such services on the premises of their schools. The State is not, by its refusal to support the religious mission of the parochial schools, infringing the free exercise rights of the students in those schools nor is it "inhibiting" religion. Furthermore, public school students are entitled to interpreter services only for secular instruction -- just as private school students are. The difficulty here is that religious and secular education in Petitioner's school cannot be separated.

The only way that the Petitioners' request in this case can be accommodated is by establishing religion. It is arguable that Petitioners free exercise rights are not even "burdened," since special education services are available to the Petitioners and, in fact, are being provided by the school district in the public school. Nevertheless, the free

exercise clause does not require the State to violate State law, much less the U.S. Constitution, in order to avoid burdening an individual's free exercise rights. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

VI. Using public funds to pay public employees to assist students in sectarian worship and sectarian instruction coerces taxpayers to provide direct support to religion.

This Court in Lee v. Weisman declined to reconsider its decision in Lemon but applied a combination of a "coercion" and an "endorsement" test in finding nonsectarian prayer at middle or high school graduations unconstitutional because of the psychologically coercive nature of the practice at an event as important as graduation and because of the school endorsement of the prayers which were required to meet guidelines provided by the school principal. The dissent disagreed with the

"psycho-coercion" standard of the majority, but conceded that:

[O]ur constitutional tradition . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in the benevolent, omnipotent Creator and Ruler of the world, are known to differ (for example, the divinity of Christ).

Petitioners argue that Weisman is not applicable here because students are not coerced. None of this Court's parochial case raise issues of coercion of students, but they involve, nevertheless, coercion -- coercion of the taxpayer. Using taxpayer funds to subsidize sectarian worship and instruction is coercive and constitutes government endorsement of sectarian religion. The government's use of moneys collected from Jews or Muslims or even from members of other Christian religions to support Catholic worship and religious education offends establishment of religion principles. In Lee

a majority of this Court held that the government's action in indirectly coercing a student to stand silently during a short nondenominational prayer is unconstitutional. It is equally coercive to require taxpayers to support conspicuously sectarian worship and religious instruction.

In this case the government is not merely indirectly supporting a passive religious symbol such as the creche in County of Allegheny v. American Civil Liberties Union, 109 S.Ct. 3086 (1989). Here the government is engaging in the highly coercive activity of taxing to aid a particular religious belief. The government is supporting religious proselytizing and has taken "the first step down the road to an establishment of religion." 109 S.Ct. at 3139 (Kennedy, J. dissenting).

VII. Private schools serve an important role as an alternative to public education but it is not accurate to portray them as relieving public schools of a financial burden.

Amicus supports the mission of private schools, both secular and religious, to provide an alternative to parents for the education of their children. However, given the serious lack of funds available for public education, Amicus believes that public funds should not be used to support private schools. In a number of earlier parochial cases, the argument has been urged on this Court, without support, that private schools relieve the financial burden of public schools by removing a large number of students from the public schools which the public schools would otherwise be required to educate. See, e.g., Wolman v. Walter, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part) (1977); Committee for Public Ed. & Religious Lib. v. Nyquist, 413 U.S. at 819 (White, J.

dissenting); Mueller v. Allen, 463 U.S. at 396. As the discussion below points out, the evidence does not support this conclusion. Similarly, there is no support for the argument that because parents of children in private school are compelled to support public school services unused by them, they should be afforded financial relief out of public funds. See, e.g., Nyquist, 413 U.S. at 813 (Rehnquist, J. dissenting in part). Taxpayers without children are also compelled to support public schools, but they are benefitted in the same way as are parents of children in private schools, because an educated populace benefits everyone.

Recently the concept of "choice" has received a great deal of publicity. President Bush, for example, included a public/private "choice" proposal in his school reform package, asking Congress for \$230 million in fiscal year 1992. The Bush Administration's latest initiative, called the "G.I. Bill for

Children," proposed to give \$1,000 vouchers, usable at public or private schools, to as many as a half million low-income families. Carnegie Foundation for the Advancement of Teaching, School Choice. However, "choice" is not the panacea it is touted to be.

A recent study by Carnegie Foundation for the Advancement of Teaching has found that "[s]chool choice to be successful, requires additional administrative and financial support. It is not a cheap path to educational reform." School Choice at 26.

Often the most expensive children (disabled, children from disadvantaged families with parents with less education) remain in the public schools, while wealthier, more educated parents send their children to private schools. For example, a survey of those participating in the Milwaukee "choice" program indicated that parents who sent their children to private schools were more highly educated than those who did not. Forty-five

percent of the mothers and female guardians had "some college" while only 29 percent of the nonparticipants had attended college. Id. at 17. The same Carnegie study also found that income is a relevant factor in parental choice. In Montclair, New Jersey where all parents must participate in choice, families with incomes less than \$50,000 used fewer sources of information in making their decisions than higher income families. Eighty-four percent of the highest income parents made visits to schools while about half of the lower income parents made the visits. Id. at 18.

Studies also indicate that there is a direct correlation between academic achievement and parental support. Met Life, (September 15, 1992). Lack of parental support is a serious problem in some public schools, particularly in large urban areas, while parental support is almost universally high in private schools, even where parents

are in a lower socio-economic situation or have less education.

There is no evidence to support the contention that public/private "choice" plans will improve education. Milwaukee is the only jurisdiction where such a plan has been implemented, and the Carnegie Foundation has found that it is too early to determine whether the plan is effective.

In Milwaukee, then, the battle lines have been drawn as clearly as any place in the nation between those who believe that public education cannot improve without the threat of competition, and those who believe that a voucher system would weaken public schools and dramatically reduce the prospects that such renewal ever will occur.

School Choice at 81.

Public schools, particularly those in large urban areas, must also deal with social problems to a greater extent than private schools -- gangs, discipline, weapons and drugs etc.

In the face of these pressures, the schools have been called upon to

take over roles formerly provided by the family, churches, and other agencies, ranging from sex education to housing and feeding children from dawn to dusk, well beyond school hours.

Robert Carr, The Wall Street Journal, May, 1991.

Public schools must comply with federal and state antidiscrimination laws while private schools are often exempt. According to the Carnegie Commission, in 1990 the U.S. Department of Education issued an opinion to the effect that private schools are not covered by the IDEA.

The Carnegie Foundation report points out that often school "choice" advocates treat the subject as one of individual "consumerism" rather than recognizing the need of upgrading education for all students. School Choice at 94. Amicus submits that it is a matter of good public policy, as well as a legal mandate, for the state to accommodate parental choice, provided the private school chosen

meets minimum state educational guidelines. But that does not mean that private choices should necessarily be funded by the public.

Amicus brings up these issues only to draw the Court's attention to the fact that this case should not be decided on a policy basis emphasizing the importance of private schools to the education of the country or the importance of the education of all children with disabilities. Amicus concedes those facts. There are also very serious and important reasons, in these times of fiscal restraint, to look to the private sector to fund private education and reserve dwindling public resources for public education.

Just as members of this Court have faulted prior decisions which make assumptions as to whether public assistance is being used to fund religious instruction, see, e.g., Meek v. Pittinger, Wolman v. Walter, Grand Rapids v. Ball, Amicus respectfully requests the Court not to make assumptions about the

relative merits of using public funds to support private secular education. That is not the issue here. The issue is whether the government in this case would establish religion were it to provide direct subsidies to religious services and instruction through the provision of an interpreter for the deaf.

CONCLUSION

Nothing in this brief should be interpreted as advocating that "our society as a whole should be a secular one." Meek v. Pittenger, 421 U.S. at 395 (Rehnquist, J. dissenting). Our society was built on a strong religious foundation, and Amicus believes young people should be exposed to religious training through their churches, temples and synagogues. But the state, qua state, should maintain religious neutrality. "[T]he line between state neutrality to religion and state support of religion is not easy to locate. 'The problem, like many problems in constitutional law, is one of

degree.'" Allen, 352 U.S. at 242. But it does not take a constitutional scholar to decide that using taxpayer money to pay for a public employee to accompany a student to Catholic religious worship and to classes which are liberally laced with Catholic dogma is support -- not just accommodation -- of sectarian religion. The argument that the provision of such a service is "incidental," demeans the importance of the religious content of the religious worship services and the religious instruction. This case presents an example of establishment of religion in a blatant form.

No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson, 330 U.S. at 15.

Amicus urges this Court to affirm the decision below.

Respectfully submitted,

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No. 92-94

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, ET AL.,
Petitioners,
v.

CATALINA FOOTHILLS SCHOOL DISTRICT,
Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF
ARIZONA SCHOOL BOARDS ASSOCIATION, INC.
IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 & Supp. III 1991), or its implementing regulations, require a state governmental agency to provide a sign-language interpreter to a deaf child in a sectarian school.
2. Whether the present controversy should be resolved by application of the three-part *Lemon* test.
3. Whether the Establishment Clause of the First Amendment bars a public school district from providing a sign-language interpreter to a deaf child at a sectarian school.

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BRIEF *AMICUS CURIAE* OF
ARIZONA SCHOOL BOARDS ASSOCIATION, INC.
IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Arizona School Boards Association, Inc. (ASBA), is an Arizona nonprofit corporation, the members of which are the governing boards of most of the 223 public school districts in the State of Arizona, including Respondent. ASBA's members, as local education agencies, are charged with the responsibility of providing special education and related services in accordance with the

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

ASBA adopts Petitioners' and Respondent's listing of constitutional and statutory provisions involved in this matter.

STATEMENT OF THE CASE

ASBA incorporates by reference the statement of the case contained in the brief of Respondent Catalina Foothills School District ("Catalina Foothills").

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Ninth Circuit has correctly affirmed the judgment of the District Court by holding that the Establishment Clause bars a public school district from providing a sign-language interpreter to a deaf child at a sectarian school. In so ruling, however, neither the District Court nor the Court of Appeals reached the question of whether the governing statutory scheme, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, and its implementing regulations, require a state governmental agency to provide a sign-language interpreter to a deaf child in a sectarian school.

This present controversy can and should be resolved by application of the three-part *Lemon* test. This Court should conclude, as a result, that the Establishment Clause bars a public school district from providing a sign-language interpreter to a deaf child at a sectarian school.

ARGUMENT

I. NEITHER THE IDEA NOR ITS IMPLEMENTING REGULATIONS REQUIRE CATALINA FOOTHILLS TO PROVIDE AN INTERPRETER TO A DEAF CHILD IN A SECTARIAN SCHOOL

Petitioners Zobrest claim in their reply to brief in opposition to the petition that the IDEA requires Catalina Foothills to provide an interpreter to a deaf child in a sectarian high school and that this legal conclusion was adopted by the courts below. (R. Br. Op. 1)¹. These allegations, however, are incorrect in both respects.

A. IDEA does not require a local education agency to provide an interpreter to a deaf child in a sectarian school.

In 1970, Congress enacted the Education of the Handicapped Act, now known as the Individuals with Disabilities Education Act ("IDEA"). Congress provided in Subchapter II of the IDEA for a program of federal grants to aid state and local authorities in providing educational assistance for children with disabilities. See 20 U.S.C. §§ 1411-1420 (1988 & Supp. III 1991).

The fundamental requirement for obtaining a grant under the IDEA is that the State make available "a free appropriate public education for all children with disabilities" in the State. 20 U.S.C. § 1412(2)(B) (Supp. III 1991). Section 1413(a)(4) (1988 & Supp. III 1991) directly addresses the State's obligations with respect to children in private schools. If school authorities have selected the

¹ "R. Br. Op." refers to the Reply to Brief in Opposition to Petition for Writ of *Certiorari*.

private school as the means of providing a "free appropriate public education" to the child, Section 1413(a)(4)(B) (Supp. III 1991) requires the State to provide the appropriate services in all cases "at no cost to * * * parents or guardian." With respect to children placed by their parents in private schools after rejecting an appropriate public school placement, the public agency need only make provision for the participation of such children in the appropriate special education or related service. Section 1413(a)(4)(A) (Supp. III 1991).

This statutory direction is explained more fully in the regulations which implement the grant program established by the IDEA. See 34 C.F.R. Pt. 300. Section 300.403(a) provides that when children with disabilities are placed in a private school by their parents' choice "the public agency is not required by this part to pay for the child's education at the private school or facility." Instead, the agency is required only to "make services available to the child as provided under §§ 300.450-300.452." Section 300.452, in turn, provides that the agency "shall provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the agency."

The meaning of this requirement is clarified by the provisions of 34 C.F.R. §§ 76.651-76.662, which establish general regulations for participation by private school students in the various grant programs administered by the Department of Education. Those regulations require the agency to "provide students enrolled in private schools with a genuine opportunity for equitable participation [in the programs offered by the agency to other students]." Section 76.651(a)(1). Benefits provided to students in private schools must "be comparable in quality, scope, and opportunity for participation to the program benefits that the [agency] provides for students enrolled in public schools. Section 76.654(a). Where "necessary to provide equitable program benefits" that are "not normally provided by the private school," the agency "may use program funds to make public personnel available" in the private school's facilities. Section 76.659.

The direction to provide or make available the special program or service, of course, does not translate into a mandatory requirement to provide and make available the program or service on the premises of a private school. The provision and availability of the service can easily be accomplished by offering the service at a free public school. Indeed, these statutes and regulations make clear that, while the IDEA allows a public agency to provide the services of an interpreter at a private school, it is not required to do so unless placement of the child at a private school has been selected by public school authorities as the means by which to educate the child. See *Goodall by Goodall v. Stafford County School Board*, 930 F.2d 363 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2649 (1991); *McNair v. Cardimone*, 676 F. Supp. 1361 (S.D. Ohio 1987), *aff'd*, *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153 (6th Cir. 1989); *Work v. McKenzie*, 661 F. Supp. 225 (D.D.C. 1987).

Indeed, the unresolved legal question is not whether the IDEA requires a public agency to provide interpretive services, but whether such services are prohibited in this context. The Education Department General Regulations (EDGAR) specify that:

1. No State or subgrantee may use its grant or subgrant to pay for any of the following:
 - a. Religious worship, instruction, or proselytization.
 - b. Equipment or supplies to be used for any of the activities [described above.]

34 C.F.R. § 76.532(a)(1). The United States, as *amicus curiae*, has contended that this provision is intended to reach no farther than the Establishment Clause of the First Amendment. See Brief for the United States as *Amicus Curiae* Supporting the Petitioners, p. 23. But the United States Court of Appeals for the Fourth Circuit has interpreted and applied this provision without reference to the Establishment Clause and, under a set of facts that were substantially

the same as those of this case, held that this provision prohibits the delivery of cued speech interpretive services at a sectarian school. *Goodall*, 930 F.2d at 369.

The resolution of this legal issue will also require a determination as to whether delivery of interpretive services at a sectarian school would violate the Arizona Constitution. Article 2, Section 12 of the Arizona Constitution states:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment.

Arizona's Attorney General has opined that the provision of interpretive services under the circumstances of this case would violate the Arizona Constitution. (J.A. 9-18)² The Attorney General's analysis appears to assume that the reach of Article 2, Section 12 of the Arizona Constitution is the same as that of the Establishment Clause of the First Amendment, but the Arizona courts have not endorsed this analysis. To the contrary, the broader and more specific prohibitions expressed in Article 2, Section 12 of the Arizona Constitution suggest that this provision has a greater scope than that of the Establishment Clause.³ Indeed, the then Vice Chief Justice of the Arizona Supreme Court (now, Chief Justice) has stated

² "J.A." refers to the Joint Appendix.

³ In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court ruled that financial assistance paid directly to a blind recipient under a state vocational rehabilitation program did not violate the First Amendment. This Court remanded the matter to the state courts for a determination as to whether the financial assistance would violate Article 1, Section 11 of the Washington State Constitution, a provision which is similar to Article 2, Section 12 of the Arizona Constitution. On remand, the Washington Supreme Court concluded that the financial assistance did violate its State Constitution. *Witters v. State Commission for the Blind*, 112 Wash.2d 363, 771 P.2d 1119, cert. denied, 493 U.S. 850 (1989).

that the textual protections of the First Amendment in the United States Constitution are much narrower than the Arizona Constitution:

[O]ur constitutional framers not only adopted the suggestions from Congress, they went much farther in delineating the proper scope of church and state interaction, banning public support of sectarian schools and prohibiting sectarian instruction at state schools. Under the first amendment's establishment clause, the United States Supreme Court has allowed the limited use of public funds for support of sectarian schools. For instance, the court upheld noncategorical grants to religious colleges and universities, reimbursing church-sponsored public schools for performing various testing and reporting services mandated by state law, loaning public textbooks to sectarian students, tax deductions for expenses incurred by taxpayers in sending their children to parochial schools and providing classes to sectarian students in public facilities on a "shared-time" basis. All of these direct and indirect aids to religious educational institutions would face a difficult examination under the broad, specific textual provisions of the Arizona Constitution. For instance, the prohibition against appropriating and applying public funds to property to support even a religious "exercise" refers to more than legislative appropriation: it includes executive and administrative contact.

Stanley G. Feldman & David L. Abney, The Double Security of Federalism: Protecting Individual Liberty Under The Arizona Constitution, 1988 Ariz. St. L.J. 115, 143-44 (footnotes omitted).

B. The Courts below did not rule on the question of whether the IDEA requires Catalina Foothills to provide an interpreter to a deaf child at a sectarian school.

Regardless of whether the legal issue is whether the IDEA requires, permits or prohibits the delivery of interpretive services to a deaf child at a sectarian school, a ruling on this legal issue was not made by the lower courts in this case. Zobrests claimed in their verified amended complaint that the IDEA required Catalina Foothills to provide an interpreter. (J.A. 21-22) This allegation was denied in Catalina Foothills' answer. (J.A. 55) In their stipulation of facts, the Zobrests and Catalina Foothills agreed only that Catalina Foothills "would be obligated under the [IDEA] to pay the cost of a certified sign-language interpreter for James Zobrest if he were enrolled in a local public high school." (J.A. 86) Upon cross-motions for summary judgment, the District Court ruled that:

Based upon the stipulated facts in the record it is clear that plaintiff James Zobrest requires the services of a sign language interpreter at Salpointe Catholic High School. However, the provision of a publicly-paid sign language interpreter at Salpointe, a pervasively sectarian school, would violate the separation of church and state.

There is no indication in the District Court's opinion that it concluded, as a preliminary matter leading to the constitutional basis for its ruling, that the IDEA required Catalina Foothills to provide James Zobrest with a sign-language interpreter at Salpointe Catholic High School. Rather than ruling on the statutory question, the District Court perhaps assumed, at least for the purposes of the cross-motions for summary judgment, that Catalina Foothills might voluntarily agree to provide an interpreter if it was not barred from doing so by the Federal or Arizona Constitutions. In any event, there is no indication that it considered the issue of whether the

IDEA required, as opposed to permits, the Catalina Foothills School District to provide an interpreter for James Zobrest.

In affirming the District Court's summary judgment, the Court of Appeals for the Ninth Circuit stated that it did not feel any need to rule on the statutory question because it believed that a stipulation of the parties permitted the Court to bypass the issue:

For the purposes of this litigation, the parties do not dispute that sign language interpretation is one of the "special education and related services" to which James is entitled. The parties agree that, if James' parents enrolled him in a non-sectarian private school or public school, the School District would be obligated to provide a sign language interpreter for him.

Zobrest v. Catalina Foothills School District, 963 F.2d 1190, 1192 n.1 (9th Cir. 1992). The problem here, however, is that there was no stipulation to the effect that a sign-language interpreter is a "special education related service" to which James would be entitled to receive in a private school. Rather, the only stipulation was that he was entitled to these services in a public school setting. (J.A. 88-89).

Regardless of whether the Ninth Circuit correctly or incorrectly characterized the disputed facts or the parties' stipulations, the unalterable fact is that neither the District Court nor the Ninth Circuit considered the merits of, or ruled on, the issue of whether the IDEA requires the placement of a sign-language interpreter in any setting other than a public school. Whether the School District voluntarily would have provided an interpreter is no longer of any concern. James Zobrest has graduated from school, and thus any issue as to voluntary provision of such services is moot. In addition, as described above, and as indicated in the Arizona Attorney General Opinion rendered on this very situation, (J.A. 9-18), the Arizona

Constitution would prohibit the School District from voluntarily providing services.⁴

The important point is that no court has yet addressed the issue of whether the IDEA requires the services at issue here to be provided. ASBA urges the Court to avoid any confusion regarding this point by clarifying in its opinion that the question as to whether the IDEA requires a public agency to provide an interpreter to a deaf child in a sectarian school has not yet been addressed. If the case is affirmed, there is no need to reach this issue. If the Court reverses on the constitutional issue, it should remand this case to the District Court to resolve the remaining issues in the case, including the issue as to the required, as opposed to permissive, application of the IDEA to the parochial school fact situation presented. In the alternative, this Court could dismiss the grant of *certiorari* as improvidently granted on the basis that the lower courts should have resolved the statutory issue before addressing the constitutional issue. See *Califano v. Yamasaki*, 422 U.S. 682, 692 (1979). This, perhaps, would be the desirable course of action to avoid completely the necessity of adjudicating the constitutional issue presented.

II. THE PRESENT CONTROVERSY SHOULD BE RESOLVED BY APPLICATION OF THE THREE-PART LEMON TEST

The briefs filed by the Zobrests and Catalina Foothills indicate that both parties believe that the present controversy can and should be resolved by a straightforward application of the three-part inquiry recognized by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Various *amici* filing briefs in support of the Zobrests, however, have suggested that this Court should reexamine the use of the *Lemon* test in its Establishment Clause analysis. See, e.g., Brief of the United States as Amicus Curiae Supporting Petitioners, p. 15,

⁴ Note that Catalina Foothills determined that it would follow the dictates of the Attorney General Opinion. (J.A. 94).

n.11. While ASBA recognizes the concerns of some members of this Court regarding the difficulty in applying the *Lemon* test, see, e.g., *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting), ASBA urges this Court to continue to recognize the three-part approach — purpose, effect and entanglement — as the proper framework of analysis for determining whether government action impairs the objectives of the Establishment Clause.

The religious heritage of this country is extraordinarily diverse and becoming more so. Public education in America has remained relatively free of religious strife because of this Court's efforts to establish and maintain a set of standards that ensures a meaningful separation of church and state. If the Court in this case develops a "new test," that action assuredly will send out a message to schools, students, parents and communities throughout this country that all of the religion-in-the-schools cases are no longer "good law" or at least are questionable. Any serious move away from the strong stand this Court has held in the past to separate religion and the state will be a clarion call to those who are eager to establish religion in the schools. Schools will then face "successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."⁵ *Meek v.*

⁵ Justice Powell's admonition about the risk of political divisiveness stemming from aid to religion is particularly appropriate:

Public schools, as well as private schools, are under increasing pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious

Pittenger, 421 U.S. 349, 372 (1974); see also *Lemon v. Kurtzman*, 403 U.S. at 622-23.

III. THE ESTABLISHMENT CLAUSE BARS A PUBLIC SCHOOL DISTRICT FROM PROVIDING AN INTERPRETER TO A DEAF CHILD AT A SECTARIAN SCHOOL

The employment by a public school district of a sign-language interpreter to accompany a student through all of his activities at a Catholic high school, including morning mass and religious classes, to interpret all communication that occurs in the student's presence, including prayers and other religious communication, violates the Establishment Clause of the First Amendment to the United States Constitution. Judged in light of the three-part *Lemon* test, provision of an interpreter under these circumstances would have the primary effect of advancing religion and would create excessive entanglement between church and state.

The sign-language interpreter's presence, at public expense, in a parochial high school would have the impermissible effect of advancing religion because the interpreter would benefit the religious-oriented educational function of the sectarian school, serve as a conduit for all religious communications to and from the student, and be used as a tool to facilitate religious interaction. See *Goodall by Goodall v. Stafford County School Board*, 930 F.2d at 370-71; see also *Meek v. Pittenger*, 421 U.S. at 366 (State aid in the form of instructional materials and equipment which "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . has the

life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."

Aguilar v. Felton, 473 U.S. 402, 416-17 (1985) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970) (opinion of Harlan, J.))

impermissible primary effect of advancing religion," quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1972)); *Wolman v. Walter*, 433 U.S. 229, 250 (1977) ("In view of the impossibility of separating the secular education function from the sectarian, the state aid [instructional materials and equipment] inevitably flows in part to support the religious role of the schools.").

The presence, furthermore, of a publicly paid employee in a parochial classroom, transmitting religious communications, would create an impermissible symbolic union between the government and the religious school. See *Goodall by Goodall v. Stafford County School Board*, 930 F.2d at 370-71; see also *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 392 (1985) (Remedial and supplementary programs conducted by public school employees on premises of parochial school creates an unacceptable "symbolic union of government and religion in one sectarian enterprise.") This Court has recognized "the danger that publicly employed personnel who provide [therapeutic] services . . . might transmit religious instruction and advance religious beliefs in their activities." *Wolman v. Walter*, 433 U.S. at 247. There is no question in this case that the interpreter, acting as a state employee, would transmit religious instruction in a sectarian school.

Zobrests try to defend this untenable situation by characterizing an educational interpreter as nothing more than a human hearing aid. This is simply at odds with reality. According to the National Task Force on Educational Interpreting:

The educational interpreter is a member of the educational team, and is relied upon by the teacher, the deaf student, and hearing peers, to relay information accurately and intelligibly both to and from the deaf students and others as needed. * * * While interpreting is the educational interpreter's primary role, and the first order of priority, it may not be his or her only role.

(A-2)⁶. Educational interpreters may be called upon to perform a number of noninterpretive tasks, including tutoring and other routine classroom duties. (A-2). In addition, an "educational interpreter's responsibilities should include provisions for what might be called "educational planning" [,] . . . time that is set aside for the educational interpreter and teacher to discuss course content, lesson plans upcoming tests, etc." (A-8). Clearly, an educational interpreter is not a hearing aid but a teacher's aide, an education professional who, as part of an education team, is expected to master the curriculum, including its religious elements, and provide a supportive role to the teacher and deaf student.

Finally, the need for periodic evaluation by other public employees of the interpreter's performance, as well as the need for periodic review by the District of the suitability of the special education services provided to the student, would create excessive entanglements between the public and parochial enterprises. See *Aguilar v. Felton*, 473 U.S. 402, 413 (1985) ("We have long recognized that underlying the Establishment Clause is "the objective . . . to prevent, as far as possible, the intrusion of either church or state into the precincts of the other," quoting *Lemon v. Kurtzman*, 403 U.S. at 614).

CONCLUSION

For all of the foregoing reasons, ASBA respectfully requests that this Court (1) clarify in its opinion that it will not address the legal issue of whether the IDEA requires a local education agency to provide an interpreter to a deaf child in a sectarian school, (2)

continue its support of the *Lemon* test in its Establishment Clause analysis, and (3) affirm the decision below.

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⁶ "A" refers to the Appendix to this Brief.

EDUCATIONAL INTERPRETING FOR DEAF STUDENTS

**Report of the National Task Force on
Educational Interpreting**

Sponsoring Organizations

American Society for Deaf Children
Alexander Graham Bell Association for the Deaf
Conference of Educational Administrators Serving the Deaf
Conference of Interpreter Trainers
Convention of American Instructors of the Deaf
National Association of the Deaf
Registry of Interpreters for the Deaf

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III. ROLES AND RESPONSIBILITIES

Roles

The fundamental role of the interpreter, regardless of specialty or place of employment, is to facilitate communication between deaf persons and others. Educational interpreters facilitate communication between deaf students and others, including teachers, other service providers, and peers, within an educational environment, usually a mainstream or quasi-mainstream setting. The educational interpreter is a member of the educational team, and is relied on by the teacher, the deaf student, and hearing peers, to relay information accurately and intelligibly both to and from the deaf student and others as needed.

The usefulness of an interpreter presupposes that the deaf student has at least the foundation of a language system, be it English or a form of sign language. Unfortunately this is not always the case, particularly among young school-age children. Likewise the usefulness of an interpreter presupposes that he or she is qualified to interpret in a form used by the child. If a continuing situation occurs in which the deaf student is unable to profit from interpreting services, the presence of an educational interpreter may be a poor use of resources and the child's placement or the interpreter assignment should be re-examined. With young children it is common to use teachers' aides rather than educational interpreters in support roles.

At least one national professional organization recommends that where possible, deaf children interact directly with their teachers in the early grades when major attention is given to language acquisition. Consensus among educators of the deaf in support of educational interpreting increases as the deaf child progresses into the upper elementary level and beyond.

While interpreting is the educational interpreter's primary role, and the first order of priority, it may not be his or her only role. With appropriate training and skills, the role of the educational interpreter may extend into non-interpreting areas. These will be discussed under "Responsibilities."

The relative proportion of time spent by the educational interpreter in interpreting and non-interpreting roles can be influenced by

a number of factors. Among these are local circumstances such as number of deaf students being served in the school district and their distribution across grade levels and school buildings. Another involves the qualifications and availability of the interpreting staff and other personnel. Obviously, the educational interpreter's background and skills should be considered in the assignment of non-interpreting tasks.

Also, if an educational interpreter is employed full time by the school district or institution, he or she is more likely to have non-interpreting duties than if employed on a part-time or hourly basis. This is due in part to the fact that interpreters cannot be expected to interpret continuously and without relief throughout a full school day, particularly in lecture-type classes where there is little or no respite. This will be discussed further under the topic of "Working Conditions."

Additionally, in situations where the educational interpreter works with the same teacher and class throughout the day, the educational interpreter is likely to have more non-interpreting duties than if he or she moves from class to class. The educational interpreter is most likely to have expanded roles that include non-interpreting duties at the primary and elementary levels.

It is stressed that the educational interpreter's primary role and first priority is as an interpreter. While engaged in interpreting, he or she should not be asked to interrupt this activity in order to perform some other task. Similarly, when the need arises for both interpreting and some other task, interpreting should take priority.

This does not imply that the educational interpreter, when not actually interpreting, should avoid other tasks because of the need to remain "on call" for interpreting. Judgment is required in each situation. (See also "Responsibilities and Ethical Considerations.")

Attention should be brought here to what is considered to be an inappropriate non-interpreting role for the educational interpreter. The role of the educational interpreter should *not* include classroom management, i.e., formal instruction or classroom supervision. Very few educational interpreters are also trained and certified teachers, and even if they are, may be qualified to teach only at particular grade levels and in particular content areas. If the educational interpreter's duties include tutoring, it should be under the teacher's supervision.

A quality education for deaf students who spend all or part of their school day in a mainstream educational environment depends on *services* and *people* with varied roles. An understanding of the overlapping and distinguishing roles of teacher, student, educational interpreter, parents, and others involved in the deaf student's education should be understood by all these persons.

Responsibilities

An educational interpreter's responsibilities are likely to vary considerably from one work setting to another. Several factors that may lead to different responsibilities are mentioned under "Roles."

One major factor has to do with the kinds and levels of training and experience the educational interpreter brings to the task. Obviously, the educational interpreter should not be assigned responsibilities for which he or she is not qualified. By the same token, the broadly qualified educational interpreter most likely can carry out numerous responsibilities in addition to interpreting. Sign language instruction is a good example. Salary, benefits, and other working conditions should be commensurate with these responsibilities.

Written guidelines and inservice training are one way to ensure that the educational interpreter's roles and responsibilities are understood by teachers and others who make up the educational team, by the students who will be using the service, by their parents, and of course by the educational interpreter.

It is also important that a member of the educational administration staff supervise the activities of the educational interpreter. While in most instances the supervisor is unlikely to have interpreting skills, he or she should have a general knowledge of interpreting requirements. The selection of an individual depends on conditions in the local system, but in general, neither an outside agency/consultant nor a teacher in whose class the educational interpreter works is recommended as the interpreter's supervisor.

Interpreting Responsibilities

The local educational authority is responsible for prescribing the mode(s) of communication to be used with deaf students. Those

mode(s) should be indicated in the interpreter's job description. It follows that it is not the interpreter's responsibility to select the mode(s) of communication to be used in class. (See also "Responsibilities and Ethical Considerations.")

As an important language model for the deaf student, the educational interpreter should be skilled in the mode(s) of communication that is/are indicated in the job description and prescribed for classroom use with the student.

Based on his or her training and experience, the educational interpreter should also be able to determine whether, and to what extent, the student understands the mode(s) of communication being used. If the student has difficulty with instructional content due to not understanding the mode(s) of communication in use, the educational interpreter should inform the appropriate member of the educational team.

"In class" interpreting. The instructional content of "in class" interpreting varies by class and level. Interpreting responsibilities at the elementary level most likely include a broad range of subject areas, such as mathematics, social studies, and the language arts, but the depth of knowledge needed by the educational interpreter in each subject area is not likely to require special technical background.

The instructional content at the secondary level takes on more depth, and may necessitate the educational interpreter's having more technical knowledge of a particular content area. For interpreting at the postsecondary level, it is important that the educational interpreter have an academic background and/or technical knowledge in one or more college-level disciplines.

In short, the depth of subject knowledge needed to interpret a third grade class in arithmetic is quite unlike that needed to interpret a course in calculus or law. It is essential that the educational interpreter have sufficient knowledge of the content to be able to interpret its concepts and vocabulary accurately and meaningfully. This is likely also to call for preparation time, e.g., to meet with the instructor, read lecture outlines, skim required readings in textbooks, and preview uncaptioned instructional videotapes.

"Out of class" interpreting. The educational interpreter's responsibilities probably will include interpreting coverage of "out of class" or extracurricular activities. These should be distinguished from other duties such as lunchroom or playground supervision and duties as a bus attendant.

Out-of-class activities are those in which the educational interpreter is present primarily to interpret for the deaf student and others outside the classroom. Such activities might include field trips, club meetings, assemblies, counseling sessions, course registrations, athletic competitions, and other school-related activities. In some school programs, interpreters may be asked to interpret for deaf parents, deaf teachers, and other deaf employees.

Out-of-class interpreting assignments requiring hours beyond the regular working hours should be compensated in some form per local policy, e.g., stipend, compensation time off, or overtime. Volunteer activities are at the discretion of the educational interpreter.

Non-Interpreting Responsibilities

Educational interpreters should not be asked to assume responsibility for duties for which they do not have the needed training and/or background knowledge. In these cases, time may need to be set aside by the interpreter and other appropriate staff for "on-the-job" training and/or support for the interpreter to take workshops and other formal training elsewhere.

Tutoring. Programs that offer special tutoring services to their deaf students frequently use educational interpreters to provide this service. However, as of 1989, very few interpreters had received special training for tutoring.

If tutoring is part of an educational interpreter's responsibilities, it should be carried out under the direct supervision of the teacher, since the teacher ultimately is responsible for teaching and assessing student progress.

The educational interpreter and the deaf student are more likely to be able to communicate directly with one another than are other

members of the educational staff with the same student, and of course this is very important in tutoring.

Communication notwithstanding, the educational interpreter's ability to tutor effectively depends also on the interpreter's level of knowledge about the subject matter being covered. In this respect, at least, tutoring may indeed be easier to do at the elementary level than at the secondary level, and easier at the secondary level than at the postsecondary level where the interpreter may not have indepth knowledge of the course content. For this reason, among others, it is more common to include tutoring among the responsibilities of educational interpreters at the K-12 levels than at the postsecondary level.

General classroom assistance. The presence of a deaf student in the regular class most likely adds to the work of the teacher, particularly at the elementary level where the student can be quite dependent on the teacher for special attention and assistance. At times when their services are not needed for interpreting, educational interpreters may volunteer or be asked by the teacher to assist with some of the more routine classroom duties, particularly when the interpreter is assigned to the same teacher and class for most or all of the school day.

This potentially sensitive area for both teacher and interpreter should be closely monitored by the supervisor. For the protection of both teacher and interpreter, and for the maintenance of a positive classroom climate, there must be a good understanding between both as to the level and kind of general classroom assistance the educational interpreter can provide the teacher and class without interfering with his/her primary responsibility for interpreting. In this context, it is emphasized that the educational interpreter should be prepared to interrupt other classroom activities when interpreting services are needed. (See also "Responsibilities and Ethical Considerations.")

Under no circumstances should the educational interpreter take on the responsibility of the teacher for management of the class.

Sign language instruction. Educational interpreters frequently are asked to assume an instructional role in teaching sign language to groups of students and school staff members. The usual preparation and certification for interpreting does not cover this area of responsibility, and most interpreters, while capable of providing informal instruction for

enrichment, are not well prepared to teach formal sign language courses. However, training and several levels of certification in sign language instruction are available through the Sign Instruction Guidance Network (SIGN) of the National Association of the Deaf, and the educational interpreter might be encouraged to make this a part of his or her professional development plan.¹

Educational planning. The educational interpreter's responsibilities should include provisions for what might be called "educational planning". This includes time that is set aside for the educational interpreter and teacher to discuss course content, lesson plans, upcoming tests, etc., in order to coordinate educational planning for the deaf student. At the elementary level, where the educational interpreter is likely to be working with the same teacher and class over the year, these meetings should be scheduled on a regular basis, particularly if the interpreter's educational duties include tutoring and/or general classroom assistance.

Educational planning should also include provisions for "preparation time" — time to preview textbooks and other instructional materials, to become oriented to subject content and vocabulary and to selected vocabulary signs, etc. — to enable the interpreter to prepare a better interpretation. (See also "Schedule.")

Reference was made earlier about the need for continuing skill development by the educational interpreter, much of which needs to be on an inservice basis as part of educational planning. This remains essential until more interpreter preparation programs provide the curriculum to prepare interpreters to work as specialists in the educational setting.

Responsibilities and Ethical Considerations

In 1979, the Registry of Interpreters for the Deaf (RID) developed a Code of Ethics, consisting of eight principles and a series of guidelines. This code was developed essentially for general situations

¹ For more information, write SIGN, National Association of the Deaf, 814 Thayer Avenue, Silver Spring, Maryland 20910.

involving deaf adults as clients, without reference to interpreting for children or interpreting in educational settings (Frishberg, 1986)².

As might be expected, the RID Code of Ethics has more immediate relevance to interpreting for deaf adults than for deaf children, and for students enrolled in postsecondary and continuing education classes than for those enrolled at the elementary or secondary levels. Educational interpreters, therefore, frequently express concerns about the applicability of particular principles of the RID Code to educational situations.

One of these principles stresses the importance of keeping all assignment-related information strictly confidential. This important aspect of the client-interpreter relationship generally applies to the student-interpreter relationship as well. A climate of trust should be maintained between interpreter, teacher, and student. Interpreters should be careful not to damage that trust by critiquing teachers' classroom behaviors to outside parties.

As with many ethical guidelines, exceptions to the confidentiality principle may occur, particularly when the safety and welfare of a child or adolescent are involved. For example, as a member of the educational team, the interpreter should exercise judgment in sharing information that is relevant to a deaf student's educational progress with other members of the team and his or her supervisor. In this regard, educational interpreters must be aware of, and adhere to, policies and procedures established by the district for its employees.

The RID Code also indicates that the interpreter should interpret in the language most readily understood by the person(s) whom he or she is serving. However, in the educational setting, it is the responsibility of school administrators, not interpreters, to determine the language to be used. If it is clear to the educational interpreter that the student is deriving little information from the prescribed form of communication, with consequences for that student's educational

² Frishberg, N, (1986), Interpreting: An Introduction, Silver Spring, Maryland: RID Publications.

development, the interpreter should feel free to discuss this with other members of the educational team and his or her supervisor.

The RID Code of Ethics addresses interpreting assignments only. It does not cover the additional responsibilities that are so common among educational interpreters. Some educational interpreters infer from this that the RID Code discourages interpreters from assuming responsibilities in the school beyond interpreting. It does not.

The prevailing opinion among educational interpreters serving students at all educational levels is that the RID Code of Ethics offers useful guidance. With some adaptations and the insertion of guidelines that more closely reflect needs and circumstances within various educational settings serving deaf students, the Code can provide an appropriate foundation of ethical principles for educational interpreters.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

LARRY ZOBREST, *et al.*,

Petitioners,

—v.—

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES
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INTEREST OF AMICI¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights, including the Religion Clauses. The ACLU has been direct counsel in this Court's most recent Establishment Clause case, *Lee v. Weisman*, __ U.S. __, 112 S.Ct. 2649 (1992), and its most recent Free Exercise Clause case, *Church of Lukumi Babalu Aye v. City of Hialeah*, No. 91-948 (argued Nov. 4, 1992). The Arizona Civil Liberties Union is a statewide affiliate of the ACLU.

The American Jewish Committee (AJC), a national organization founded in 1906, is dedicated to the defense of the religious rights and freedoms of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society. In support of this vital principle, AJC through the years has filed numerous briefs in this Court. We do so again in the conviction that the Establishment Clause bars government funding of sectarian school instruction in any way, shape or form.

Americans United for Separation of Church and State is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United is composed of some 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths with some holding no religious affiliation. They are united, however, in their

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

commitment to the long-standing American principle of church and state separation. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including several of the cases that serve as the basis for the decisions below.

The Anti-Defamation League (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. In support of this principle, ADL has previously filed *amicus* briefs in such cases as *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992); *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986); *Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); and *Abington v. Schempp*, 374 U.S. 203 (1963). ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

SUMMARY OF ARGUMENT

The provision of a sign language interpreter by the state in a sectarian school would violate the most fundamental principles underlying this Court's Establishment Clause decisions because it would entail the expenditure of tax dollars and the participation of a state employee to assist directly in the teaching and propagation of religious beliefs. While the Court has permitted states to provide certain types of secular aid to students who attend sectarian schools, provided that the aid is not actually used to assist in any religious aspect of the school's program, it has repeatedly invalidated state aid that

would or might be used to assist in the communication of religious beliefs or ideas. Thus, the Court has never permitted state employees to participate in the communication of religious instruction, and has refused to permit state employees to engage in activities on the premises of a sectarian school where the activities carried any significant risk that the employees would participate in communicating religious beliefs or ideas. These precedents compel the conclusion that the Establishment Clause prohibits a state from providing a state-paid sign language interpreter to a deaf child attending a sectarian school, where it is undisputed that the state employee would participate directly in the communication of the child's pervasively religious education.²

This Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), do not compel a different result. Specifically, those decisions do not stand for the broad proposition suggested by petitioners -- namely, that the state's decision to funnel its aid through individual parents or students, rather than directly to a sectarian school, immunizes the aid from Establishment Clause scrutiny. Moreover, provision of a sign language interpreter in a pervasively sectarian secondary school is constitutionally different, both in form and substance, from the benefits addressed in *Mueller*

² In holding that the provision of a sign language interpreter by the state would violate the Establishment Clause, the court of appeals relied primarily on its conclusion that "[the] presence and function of an employee paid by the government in sectarian classes would create [a] 'symbolic union' [between government and religion] . . . [and] create the appearance that it was a 'joint sponsor' of the school's activities." *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190, 1194-95 (9th Cir. 1992). While agreeing with this conclusion, *amici* submit that the provision of a sign language interpreter in a sectarian school violates the Establishment Clause in an even more fundamental way, because it amounts to actual assistance by the state in the teaching and propagation of religious beliefs.

and *Witters*. The provision of a sign language interpreter, unlike the granting of either tax deductions to parents or cash assistance to a college student, and also unlike the provision of a mechanical hearing aid, would entail the actual participation of a state employee paid directly out of tax dollars in the teaching and propagation of religious beliefs; it would create a "symbolic union" between the state and religion and thereby convey a message of endorsement of religious education; and, because of the integral role a sign language interpreter plays in a deaf student's religious education, it would involve excessive entanglement by the state with religion.

Finally, contrary to the claim advanced by petitioners' and their supporting *amici*, the refusal to provide a state-paid sign language interpreter in a sectarian school does not burden petitioners' free exercise rights or "discriminate" against religion. This Court has never held that free exercise rights are burdened by a state's refusal to provide affirmative assistance to an individual's or institution's pursuit of religious activities, even if similar assistance is provided to nonsectarian activities. This Court's decisions have held only that a state may not deny certain generally available benefits unrelated to religious activities (such as unemployment compensation) to an individual based upon that individual's religious beliefs or practices. Here, petitioners seek to have the state provide the means by which James Zobrest's religious education will be communicated to him. That is a benefit that is not generally available to individuals, including deaf children, who do not choose to attend a sectarian school. The Free Exercise Clause does not require the state to provide such special benefits to religion and the Establishment Clause expressly forbids it. Thus, the two Religion Clauses can and should be read harmoniously to deny the relief petitioners seek in this case.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE PROHIBITS A STATE FROM PROVIDING A STATE-EMPLOYED SIGN LANGUAGE INTERPRETER TO COMMUNICATE A DEAF CHILD'S Pervasively RELIGIOUS EDUCATION

A. The State May Not Expend Tax Money Or Otherwise Provide Assistance To The Propagation Of Religious Beliefs Or Teaching

This Court has repeatedly and consistently held that a state may not expend tax money or otherwise provide any assistance whatsoever to the teaching or propagation of religious beliefs. In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), Justice Black wrote that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . whatever form they may adopt to teach or practice religion." In *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971), Chief Justice Burger held that "[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction" In *Bowen v. Kendrick*, 487 U.S. 589 (1988), Justice Rehnquist reiterated Justice Brennan's admonition that the Establishment Clause "prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith" and, for that reason, the Court has "struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid." *Id.* at 611-12, quoting *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985). Most recently, in *Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649 (1992), Justice Kennedy wrote that "[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," and emphasized that, "at a minimum, the Constitution guarantees that government may

not coerce anyone to support or participate in religion or its exercise" *Id.* at 2656.³

Consistent with this broadly shared and long held view, the Court has upheld aid to sectarian elementary and secondary schools only upon finding that the aid would not be used in any manner to teach or otherwise inculcate religious beliefs or ideas. For example, in *Everson*, the Court held that the payment of bus fares of parochial school pupils, like the provision of police and fire protection, survived Establishment Clause scrutiny because it was "so separate and so indisputably marked off from the religious function [of the schools]." 330 U.S. at 18.

Similarly, in *Wolman v. Walter*, 433 U.S. 229 (1977), the Court approved the provision of diagnostic services to parochial school students because the services "have little or no educational content and are not closely associated with the educational mission of the nonpublic school," *id.* at 244, and approved therapeutic services provided on public property because there was no danger in that setting that a state-paid therapist would participate in communicating religious beliefs or ideas. *Id.* at 247. And, in *Mueller v. Allen*, 463 U.S. 388, the Court upheld tax deductions for expenses incurred by parents in sending their children to sectarian schools only after emphasizing that "state officials must disallow deductions taken for 'instructional books and materials used in the

³ *Amici* Christian Legal Society, *et al.*, attack what they characterize as the "religious uses" approach to the Establishment Clause because "[its] underlying theory is that taxpayers may not be compelled to support religious activity." Brief of Christian Legal Society at 15. *Amici* simply ignore the long and unbroken line of decisions in which this Court has correctly held that the purpose of the Establishment Clause was to fulfill the framers' "conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions" *Everson*, 330 U.S. at 11.

teaching of religious tenets, doctrines or worship" *Id.* at 403.⁴

On the other hand, where the Court has found either that state aid would be used to assist in the teaching of religion or that there was even a significant *risk* that it would be so used, the Court has consistently held that the aid was prohibited by the Establishment Clause. For example, in *Lemon*, the Rhode Island and Pennsylvania programs to supplement the salaries of teachers in parochial schools both contained strict prohibitions against the teachers participating in religious education at the schools. 403 U.S. at 608, 610. The Court nevertheless held that, due to the pervasively sectarian nature of the parochial schools, "the *potential* for impermissible fostering of religion is present," and the programs were therefore unconstitutional. *Id.* at 615-22. In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court held that state grants for maintenance and repair of parochial school buildings were unconstitutional because "[n]othing in the statute . . . bars a qualifying school from paying out of state funds the salaries of employees who maintain the school

⁴ See also *Board of Education v. Mergens*, 496 U.S. 226, 253 (1990) (statute prohibited faculty or school officials from participating in non-curricular religious meetings held on secondary school premises pursuant to Equal Access Act); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (private schools may be reimbursed for administering state-required tests if there are "effective means for insuring" that the payments will "cover only secular services"); *Roemer v. Board of Public Works*, 426 U.S. 736, 760 (1976) (grants to private colleges not to be used for "sectarian purposes"); *Hunt v. McNair*, 413 U.S. 734, 744-45 (1973) (lease agreements financed by state grants to church-affiliated colleges "must contain clause forbidding religious use"); *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (any federally subsidized facilities in sectarian institutions must "expressly prohibit their use for religious instruction, training, or worship"); *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (holding that state can provide sectarian schools with secular textbooks that are not "instrumental in the teaching of religion").

chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities." *Id.* at 774. Similarly, because there was no "effective means for guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes," the provision of financial assistance to sectarian schools through tuition grants was prohibited. *Id.* at 780-83.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), Justice Stewart held that states may provide church-related schools only "secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school." *Id.* at 364. The Court, therefore, invalidated state funding of teachers for remedial and exceptional students in sectarian schools. As Justice Stewart explained: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Id.* at 370-71, quoting *Lemon*, 403 U.S. at 619. The Court in *Wolman* invalidated the state's funding of field trips by students at sectarian schools because of the "unacceptable risk" that the trips would be used in furtherance of the schools' religious mission. 433 U.S. at 250-51. Similarly, in *Grand Rapids School District v. Ball*, 402 U.S. 373, and *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court held that the Establishment Clause prohibits the use of publicly funded teachers to provide secular classes in sectarian schools because the teachers "may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs." *Grand Rapids*, 473 U.S. at 385; *Aguilar*, 473 U.S. at 408-09.

Here, it is undisputed that a sign language interpreter provided by the School District at Salpointe Catholic High School would participate in the communication of religious tenets and beliefs. The sign language interpreter would be James's principal means of communicating with his teachers and fellow students at Salpointe, and his teachers' and fellow students' principal means of

communicating with him. The Stipulation of Facts demonstrates the extent to which this communication would amount to the teaching, inculcation and propagation of religious ideas, beliefs and doctrines: Salpointe is "pervasively religious in character"; its objective "is to nurture its students' ability to make moral choices and to instill a sense of Christian values"; "its distinguishing purpose [is] the inculcation in its students of the faith and morals of the Roman Catholic Church"; "all students are provided formal instruction in the Roman Catholic faith"; religious programs "are not separate from the academic and extra-curricular programs, but are instead interwoven with them"; "[t]he two functions of secular education and advancement of religious values are inextricably intertwined throughout the operations of Salpointe"; and "Mass is celebrated at Salpointe each school day from 7:55 a.m. until 8:20 a.m." and students are encouraged to attend. J.A.90-92. In other words, *everything* that a state-paid sign language interpreter would be communicating to James at Salpointe would be part and parcel of the school's teaching, inculcation and propagation of the Roman Catholic faith.

Amici submit that such an expenditure of tax money and provision of assistance to the propagation of religion is plainly prohibited by this Court's prior decisions under the Establishment Clause. The Court need do no more than find, as it must, that the state aid involved here constitutes the use of tax money directly to assist in the teaching of religion in order to affirm the Ninth Circuit's decision.⁵

⁵ The fact that the state aid in this case would be used directly in the communication of religious teaching and beliefs clearly and unmistakably distinguishes such aid from the provision of police and fire protection, maintenance of streets and sidewalks, and other types of secular general benefits unrelated to the religious mission of a sectarian school. Thus, the United States' suggestion that affirmance of the

(continued...)

B. Provision Of A State-Paid Sign Language Interpreter In A Sectarian School Would Have A Primary Effect Of Advancing Religion And Would Entail Excessive Entanglement Of The State With Religion

Relying principally on this Court's decisions in *Muel-ler* and *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, petitioners and their *amici* contend that the provision of a sign language interpreter to James Zobrest does not violate the Establishment Clause because it is merely the provision of a "general government benefit" to private individuals without reference to religion.⁵ This contention depends upon a vastly over-simplified and inaccurate reading of this Court's Establishment Clause decisions, including *Mueller* and *Witters*. As explained below, the Ninth Circuit's decision is fully consistent with *Mueller* and *Witters* and is compelled by this Court's other prior decisions.

1. The Fact That Provision Of State Aid At A Sectarian School Depends Upon The Choice Of Individual Parents To Send Their Child To Such A School Does Not Immunize The Aid From Establishment Clause Scrutiny

Petitioners and various *amici* contend that provision of a sign language interpreter to James Zobrest does not violate the Establishment Clause because it is "the sort

⁵ (...continued)

Ninth Circuit's decision would lead to "absurd results" with respect to such other types of aid is wrong. Brief of the United States at 18-19.

⁶ *Amici* agree that both the Individuals with Disabilities Education Act, 20 U.S.C. §1400, *et seq.*, and the provision of an interpreter to James Zobrest in this case have "a secular legislative purpose" and therefore satisfy the first prong of the *Lemon* test. *Lemon*, 403 U.S. at 612.

of attenuated financial benefit [that is] ultimately controlled by the private choices of individual parents." Petitioners' Brief at 15; Brief of United States at 18 (both citing *Mueller*, 463 U.S. at 400). But this Court has consistently rejected the notion that the mere fact that "aid was formally given to parents and not directly to the religious schools," *Grand Rapids*, 473 U.S. at 394, is sufficient to immunize the aid from Establishment Clause scrutiny. In *Meek v. Pittenger*, the Court held that "it would exalt form over substance if this distinction were found to justify a [different] result." 433 U.S. at 250. In *Mueller* itself, the Court reaffirmed its ruling in *Nyquist* that "the fact that aid is disbursed to parents rather than to . . . schools" is "only one among many factors to be considered." *Mueller*, 463 U.S. at 399, quoting *Nyquist*, 413 U.S. at 781. Most recently, in *Witters*, the Court held that "[a]id may have that [impermissible] effect even though it takes the form of aid to students or parents." 474 U.S. at 487. Cf. *Grove City College v. Bell*, 465 U.S. 555, 565 (1984) (economic effect of direct aid to institutions and indirect aid paid through third person "often is indistinguishable").⁷

Moreover, *Mueller* and *Witters* dealt with types of state aid to sectarian education that are very different from the sign language interpreter at issue in this case. In *Mueller* and *Witters*, the state aid that was channeled

⁷ A rule that state aid is immune from Establishment Clause scrutiny merely because it is channeled through parents and students rather than provided directly to sectarian schools would create absurd and pernicious results. For example, such a rule might immunize from scrutiny a program whereby books selected by parents would be provided to students for use in sectarian schools, making it permissible for the state to provide Bibles and other religious books for use in those schools. Such a result would be anomalous indeed, in the face of the care this Court has properly taken in past decisions to ensure that states were not providing precisely such religious materials for use in sectarian schools. E.g., *Board of Education v. Allen*, 392 U.S. at 244-45.

through individual parents or students was purely financial, did not involve state participation in religious education, and created no visible link between the state and religious education. In neither instance were any tax dollars paid directly to any person who participated in the teaching or propagation of religious beliefs and no state employee participated in such religious activities.

Here, by contrast, tax dollars would be paid to a state-employed sign language interpreter who would actually participate in the communication of a pervasively religious education. That fact alone distinguishes this case from *Mueller* and *Witters*, and, as discussed above, is sufficient under this Court's prior decisions to render provision of a sign language interpreter impermissible under the Establishment Clause.

In addition, this case is very different from *Mueller* and *Witters* in several other respects. In *Mueller*, the Court concluded that, because the state financial aid was "available only as a result of decisions of individual parents, no 'imprimatur of state approval'" was present. 463 U.S. at 399, quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). Similarly, in *Witters*, the aid was purely financial and was available to the sectarian college only as a result of decisions by individual students, so that no "message of state endorsement of religion" could be inferred. 474 U.S. at 488-89. Indeed, in neither *Mueller* nor *Witters* would the fact of the state financial aid likely even be known to anyone other than the individual parents or students who chose to apply it toward a sectarian education, so that any "symbolic union" of church and state would be limited.⁸ Here, where the state aid takes the

⁸ In addition to involving a different type of aid than this case, *Witters* involved use of that aid at a college, not an elementary or secondary school. This Court has repeatedly held that Establishment Clause concerns are greater at the elementary and secondary school levels (continued...)

form of a state employee actually participating in religious classes and exercises on the premises of the sectarian school, the same cannot be said. To the contrary, the "symbolic union" of state and sectarian school that results from having a state employee participate in religious education is likely to create an "imprimatur of state approval," see pp.14-15, *infra*, and therefore to convey an impermissible "endorsement" of religious education. See *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

Furthermore, this case presents entanglement problems that were not present in either *Mueller* or *Witters*. In *Mueller*, the Court found that provision of tax deductions for educational expenses did not "'excessively entangle' the State in religion" in violation of the third part of the *Lemon* test. 463 U.S. at 403. In *Witters*, the Court expressly did not address whether the state aid involved excessive entanglement because the state courts had not reached that question. 474 U.S. at 489 n.5. As explained more fully below, however, a sign language interpreter is an integral part of a child's educational experience at a sectarian school, who is not only responsible for translating the religious messages of the child's teachers, but who will spend the entire day by the child's side in the pervasively religious atmosphere of the school. See p.15, *infra*. Unlike tax deductions for parents or cash assistance to a college student, this participation by a state employee in religious education, even if it were otherwise permissible, would require such a degree of supervision to guard against impermissible inculcation of religious ideas or beliefs that it offends the Establishment Clause.

⁸ (...continued)
than at the college level. E.g., *Lee v. Weisman*, 112 S.Ct. at 2658; *Tilton*, 403 U.S. at 685-87.

2. A Sign Language Interpreter Is Not Analogous To A Hearing Aid Or Other Forms Of Secular Assistance That Might Permissibly Be Provided To A Student Attending A Sectarian School

Petitioners and their *amici* assert that the effect of providing a sign language interpreter in a sectarian school is "secular" because "[h]is function is mechanical," Petitioners' Brief at 17, and that "an interpreter is analytically indistinguishable from a hearing aid," Brief of United States at 21. These assertions are incorrect and inconsistent with this Court's prior decisions for several reasons.

An interpreter is a person, not a machine, and is not indistinguishable, analytically or otherwise, from a hearing aid. A hearing aid does not appear in religious classes and at religious services as a representative of the state for all to see. Moreover, there is no risk that a hearing aid will communicate to a deaf child anything other than precisely what other persons are saying, and therefore no risk that a child using a hearing aid provided by the state would, because of the state aid, receive religious teaching in addition to or different from what every other child is receiving.

By contrast, a sign language interpreter will be present and visible, by James Zobrest's side, throughout each day of his religious education at Salpointe. In *Grand Rapids*, this Court held that state-paid instructors could not teach in sectarian schools in part because of the "crucial symbolic link between government and religion" that might appear "in the eyes of impressionable youngsters." 473 U.S. at 385. The Court so held even though the instructors in *Grand Rapids* would not have participated in any aspect of the religious program at the sectarian schools. Here, a state-paid sign language interpreter would actually participate in religious classes and services, thereby making the likelihood that students

would perceive a "symbolic link" between government and religion, and therefore a message of government endorsement of religious education, even greater than in *Grand Rapids*.⁹

Further, a sign language interpreter would spend the entire school day with James Zobrest at Salpointe. Unlike a hearing aid, the interpreter would have countless opportunities either intentionally or inadvertently to inculcate religious tenets or beliefs, whether they be the same as those expressed by James's teachers or different. The interpreter will be the student's only means of communicating "verbally" with his teachers and fellow students, and will be the only person with whom the student can communicate directly. The interpreter is "a member of the educational team, and is relied on by the teacher, the deaf student, and hearing peers, to relay information accurately and intelligibly both to and from the deaf student and others as needed." See "Educational Interpreting for Deaf Students: Report of the National Task Force on Educational Interpreting" (Rochester Institute of Technology 1989) at 7. Thus, like the auxiliary-services personnel in *Meek*, sign language interpreters would be "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371.

Petitioners and *amici* place great emphasis on the ethical guidelines that govern sign language interpreters.

⁹ Petitioners' and *amici*'s equation of a sign language interpreter with a hearing aid proves far too much. Under that equation, presumably it would be permissible for the state to provide sign language interpreters to interpret Sunday church services or similar religious exercises. Surely the presence of a state employee standing before a congregation translating a minister's sermon would offend any Establishment Clause test consistent with the fundamental purposes of that Clause.

But given the pervasively sectarian atmosphere of a parochial school and the fact that the interpreter will spend all day, every day, at the student's side in that school, one need "not question that the dedicated and professional [interpreters]," *Grand Rapids*, 473 U.S. at 387, will attempt to perform their jobs in good faith and comply with those guidelines in order to conclude that there is a substantial risk that they will subtly or overtly participate in inculcating religious ideas. *Id.* at 387-89; *Meek*, 421 U.S. at 369 ("the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained").¹⁰ Indeed, petitioners' and *amici*'s argument wholly ignores the fact that the sign language interpreter will not merely be translating what James Zobrest's teachers say in class, but will be interacting with him outside the classroom as well. Unlike a hearing aid, a sign language interpreter is both able and likely to respond to a signed question from his charge after class, such as "What did the teacher mean by . . . ," or "Could you tell me again what the teacher said about"

Because the role of a sign language interpreter is not merely "mechanical," provision of an interpreter, by contrast to a hearing aid, will require state supervision that entails excessive entanglement in violation of the

¹⁰ Contrary to the assertions of petitioners and *amici*, a sign language interpreter who participates in religious classes and services is far more comparable, for Establishment Clause purposes, to an instructor of secular subjects or a counselor than to a diagnostician. See *Wolman*, 433 U.S. at 241-44. In *Wolman*, the Court upheld the provision of diagnostic services because they "have little or no educational content and are not closely associated with the educational mission of the non-public school," and because they have "only limited contact with the child." *Id.* at 244. By contrast, a sign language interpreter is an essential part of every educational communication to a deaf student, including the communication of religious tenets and doctrines, and has more contact with the child than anyone else in the school.

Lemon test. A sign language interpreter in a sectarian school will be called upon to interpret the religious ideas being expressed by a child's teacher's into a different language. *Amici* fully accept that most interpreters will attempt in good faith to comply with the ethical guidelines that require them to "render the message faithfully, always conveying the content and spirit of the speaker." J.A.72. But translating the content and spirit of a religious message into a different language, whether it be sign language or any other, is not a purely "mechanical" task. Even if the interpreter attempts to comply in good faith with the ethical guidelines, he or she may still communicate religious ideas subtly different from those being expressed verbally by a teacher. Because the interpreter is a state employee, the state will be required to monitor his performance to ensure that he is "conveying the content and spirit" of the teacher's religious ideas accurately. See *Sedalia School District v. Missouri Commission on Human Rights*, Case No. 45447 (Mo.Ct.App., W.Dist. 1992)(slip op.)(public school district justified in firing a high school sign language interpreter who violated guidelines). There is obviously no way for the state to do this without examining the religious messages that the sectarian school seeks to convey. Thus, even under the overly narrow approach to "entanglement" proposed by some *amici*, such monitoring of an interpreter's communication of religious messages would "touch on issues of religious significance" and violate the Establishment Clause. See Brief of Christian Legal Society at 25.

3. Advancing Religion Need Not Be The "Predominant" Effect Of State Aid In Order To Invalidate It Under The Establishment Clause

Petitioners assert that the "predominant" effect of the services of an interpreter for James at Salpointe would be "identical to the secular effects produced in public schools," and that the state aid in this case there-

fore does not have a "primary" effect that advances religion in violation of the second prong of the *Lemon* test. Petitioners' Brief at 10-12. First, as the Stipulation of Facts summarized above demonstrates, petitioners' assertion is inaccurate. The predominant effect of the interpreter's services would be to facilitate James's religious education because that is the predominant purpose and effect of an education at Salpointe. See p.9, *supra*.

Second, even if petitioners' factual assertion were accurate, the interpreter's services would still have a "primary effect" of advancing religion within the meaning of *Lemon*. Virtually all of the forms of state aid invalidated by this Court in the past, such as instructional equipment and materials, state-funded teachers of secular subjects, and grants for maintenance and repair of school buildings, could be said to have a "predominantly" secular effect on the same theory as petitioners advance here: that the effects of the aid would, for the most part, be the same as the effects of the same aid in a public school. The Court has nevertheless in each instance held that a "primary" effect of the aid was to advance religion in violation of the *Lemon* test. Indeed, in *Nyquist*, the Court expressly rejected the argument made by petitioners here: "Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." 413 U.S. at 783 n.39.

Provision of a state-paid sign language interpreter to a student in a pervasively sectarian school such as Salpointe unquestionably has the "direct and immediate" effect of advancing religion by providing the means by which religious beliefs, ideas and doctrine will be communicated to a child.

4. The Court Must Examine The Effect Of State Aid In Sectarian Schools, Not Merely The "Overall" Effect Of The State's Program

In a related vein, petitioners and their *amici* suggest that the Ninth Circuit improperly focused on the "primary" effect of the state's provision of sign language interpreters in sectarian schools, rather than the "primary" effect of the entire program in all schools. Petitioners' Brief at 16; Brief of Christian Legal Society at 13. Petitioners and their *amici* apparently contend that any program that provides the same aid to all schools without regard to religious affiliation is "neutral" and therefore constitutional even if the aid is in fact being used to further religion in sectarian schools. This approach, if accepted by the Court, would immunize many forms of state aid to religion from Establishment Clause scrutiny and be inconsistent with most of this Court's prior decisions concerning state aid to sectarian schools.¹¹

For example, a program whereby the state provided state-paid teachers to all schools, including sectarian schools, would obviously have a "primary" effect "overall" -- providing teachers for public school students -- that is secular. Moreover, under *amici's* definition, the program would be "neutral" because the benefits would be provided to all schools without regard to religion. The result under either approach would be to allow state-employed instructors to teach in sectarian schools, in direct conflict with this Court's decisions in *Lemon*, *Grand Rapids* and *Aguilar*. Similarly, under either approach, a program whereby the state provided instructional materials, ther-

¹¹ In *Bowen v. Kendrick*, Justice Kennedy indicated that, even where a statute provides benefits in a neutral fashion to religious and nonreligious applicants alike, the Court must still determine whether "the funds are in fact being used to further religion" in a pervasively sectarian institution. 487 U.S. at 624 (Kennedy, J., concurring).

peutic services, and grants for maintenance and repair to all schools, including sectarian schools, would be permissible, in direct conflict with this Court's decisions in *Nyquist* and *Meek*.¹²

II. A STATE'S REFUSAL TO PROVIDE A SIGN LANGUAGE INTERPRETER IN A SECTARIAN SCHOOL NEITHER BURDENS FREE EXERCISE RIGHTS NOR "DISCRIMINATES" AGAINST RELIGION

Contrary to the holding of the Court of Appeals and the assertions of petitioners and various *amici*, respondent's refusal to provide a sign language interpreter in a sectarian school does not burden petitioners' rights under the Free Exercise Clause, as that clause has been interpreted by this Court, and does not "discriminate" against religion. As this Court has emphasized, "[t]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 700 (1986), quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). Consistent with this reading of the Free Exercise Clause, the Court has never accepted the notion that the government's refusal to provide benefits for use in religious activities in sectarian schools burdens free exercise rights or violates the Equal Protection Clause. Cf. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

To the contrary, the Court has consistently held that benefits to sectarian or church-affiliated schools are only permissible under the Establishment Clause if there exist sufficient safeguards to ensure that the benefits will not

¹² *Amici* Christian Legal Society, *et al.*, concede that the "government neutrality" approach they advocate would require the Court to overrule most of the Court's prior decisions concerning state aid to sectarian schools. Brief of Christian Legal Society at 15.

to be used for religious purposes. See pp.6-7, *supra*. In so holding, the Court has never even suggested that a state's explicit denial of otherwise available benefits for use in religious activities "discriminated" impermissibly against religion or burdened Free Exercise rights. See, e.g., *Mueller*, 463 U.S. at 403 (statute required state to disallow deductions for books used for religious purposes); *Lemon*, 403 U.S. at 608-10 (statute denied otherwise available salary supplements for any instructor teaching religion); *Tilton*, 403 U.S. at 675 (statute prohibited otherwise available grants to be used for any facility used for religious purposes); *Allen*, 392 U.S. at 244-45 (statute prohibited loan of religious textbooks).

Petitioners and their *amici* mistakenly rely upon cases in which this Court has held that denial of a purely secular and generally available benefit based upon an individual's religious beliefs or practices violates the Free Exercise Clause. See, e.g., *McDaniel v. Paty*, 435 U.S. 618 (1978) (disqualification of minister from serving as delegate to constitutional convention); *Sherbert v. Verner*, 374 U.S. 398 (denial of unemployment benefits because individual's religion required her not to work on Saturday). In none of these cases would the benefit sought by the individual have been used by that individual in the practice of his or her religion, and certainly the cases did not involve the direct participation of a government employee in religious practices or teaching. The cases are therefore different from this case in two critical respects.

First, because the cases did not involve a demand that the state actually expend tax dollars to provide assistance to an individual in the practice of his religion, they did not raise the fundamental Establishment Clause problem that exists here. *McDaniel*, 435 U.S. at 628-29; *Sherbert*, 374 U.S. at 409-10. Thus, the state's compelling interest in avoiding a violation of the Establishment Clause could not justify any burden on free exercise rights in those cases.

Second, the benefits sought by the individual plaintiffs in those cases were indistinguishable from the benefits provided to other individuals: in *McDaniel*, the right to serve as a delegate; in *Sherbert*, the right to unemployment compensation. Here, by contrast, the benefit that petitioners seek is *different* from the benefit available to others. James Zobrest's parents want the state to provide him with assistance, in the form of a sign language interpreter, in obtaining a *religious* education. That benefit is not available to those parents, including parents of profoundly deaf children, who do not choose or whose religions do not require them to seek an education for their child at a sectarian school. Those parents must provide whatever special assistance their child needs to obtain a religious education at their own expense. Thus, were the state to provide a sign language interpreter to students in sectarian schools, it would in fact discriminate against other students on the basis of religion and impermissibly create an incentive for parents to send their children to sectarian schools rather than nonsectarian schools, in violation of both the Free Exercise Clause and the Establishment Clause. Far from "singl[ing] out students who attend religious schools for a special disability," Brief of Christian Legal Society at 8, the state has merely declined to provide those students with a special benefit based upon their religious beliefs and practices.¹³

¹³ *Amici* attempt to distinguish between governmental policies or actions that "create[] an incentive to engage in a religious practice" -- which *amici* say are impermissible -- and those in which "obstacles to religious exercise are lifted." Brief of Christian Legal Society at 20. Here, as explained above, we submit that provision of a sign language interpreter in a sectarian school does not merely "lift an obstacle" to religious exercise, but creates an "incentive" to send children to sectarian schools by providing assistance to religious teaching in those schools. But we also submit that *amici*'s semantic dichotomy is not helpful to reaching the correct result in most cases. For example, does it create an "incentive" for individuals to adopt a religion that precludes work on Saturdays, if they can thereby get unemployment

(continued...)

This analysis demonstrates that respondent's failure to provide a sign language interpreter in a sectarian school does not burden petitioners' free exercise rights for the same reason that doing so would violate the Establishment Clause: in providing an interpreter in a sectarian school, the state would be providing direct assistance in the teaching and propagation of religious beliefs and ideas. Thus, properly understood in light of this Court's prior decisions, this case provides an excellent illustration that "the two Clauses are harmonious and mutually reinforcing provisions with the central and unifying purpose of protecting the freedom of religion." Brief of Christian Legal Society at 1. No reexamination of the Court's interpretation of the Religion Clauses is

¹³ (...continued)

compensation they could not otherwise obtain, or does it merely "lift an obstacle"? See *Sherbert*, 374 U.S. 398. Similarly, does it create an "incentive" to religious belief and exercise, or merely "lift an obstacle," for the government to exempt persons with certain beliefs from military conscription? See *Gillette v. United States*, 401 U.S. 437, 454-60 (1971). This is but one illustration of the fact that the relationships between government and religion, and the proper application of the Religion Clauses to those relationships, are too complex to be governed by the purportedly "simple" and "neutral" dichotomies proposed by *amici*. See also n.12, *infra*.

necessary either to reach the proper result in this case or to fulfill those Clauses' mutual and harmonious purpose.¹⁴

¹⁴ *Amici* Christian Legal Society, *et al.*, set up a false "conflict" between this Court's interpretations of the Free Exercise Clause and the Establishment Clause in order to persuade the Court that "reexamination" is essential. Thus, *amici* argue that "[t]o say a single governmental act . . . is both a burden on the free exercise of religion *and* necessary to avoid an advancement of religion suggests that the court is using inconsistent understandings of 'advancement' and 'burden.'" Brief of Christian Legal Society at 6. We have demonstrated above that the state's refusal to provide a sign language interpreter in a sectarian school does not burden free exercise rights, so that no such circumstance exists in this case in any event.

However, we also disagree with *amici*'s argument that, under a proper interpretation of the Religion Clauses, a governmental act can never be both a burden on free exercise rights and necessary to avoid an advancement of religion. If an instructor in a public elementary school believed that his religion required him to proselytize his students, and he were fired or disciplined for doing so, there would be a "burden" on his free exercise rights because he would have been penalized based solely upon his religious beliefs and practices. See *Bishop v. Aronoff*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3026 (1992); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3025 (1992). However, a public school teacher's proselytizing of his students unquestionably constitutes an "advancement" of religion by the state that is prohibited by the Establishment Clause. We submit that, confronted with such a situation, this Court would undoubtedly hold that the "burden" on the teacher's free exercise rights was justified by the state's compelling state interest in avoiding such advancement of religion by its teachers.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Council on Religious Freedom ("CRF") is a national nonprofit organization which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis. Council on Religious Freedom has as one of its major interests the relationship of free exercise principles to non-establishment concerns with the view of maximizing religious freedom.

Many of the members of CRF have children enrolled in church-operated schools and are concerned that those schools continue as distinctive sectarian ministries of their church. Also, several members of the CRF Board have served on the governing boards of religious educational institutions and appreciate the need for those institutions to be free to convey their religious ideals within those school walls and to integrate the sponsoring church's religious values with education.

Pursuant to Rule 37.3, the letters from the parties consenting to the filing of this brief are being filed simultaneously with this brief.

INTRODUCTION

The Council on Religious Freedom is troubled by the assertion made in this case by parents who have elected to enroll their child in a pervasively sectarian school and now argue that the free exercise and equal protection provisions of the Constitution mandate the placement of a public school employee on the campus of a church-operated school. This is of particular concern since most sectarian schools necessarily insist on the right to select and maintain both students and staff in accordance with religiously-based policies and standards. Amicus believes that the impact of this Court's decision may be much greater than

only the determination of constitutional uses of tax monies.

This is not a case where taxpayers have challenged a school district's decision to place a deaf child in a private school and to provide assistance in the form of an interpreter. Rather, this suit involves a civil action initiated by a parent under the EHA, 20 U.S.C. § 1415(e), seeking an injunction requiring the school district to provide on-premises services for a deaf student placed by parents in a private school. Here, the school district petitioned the Pima County, Arizona, Attorney for an opinion on the constitutionality of providing such services under both the federal and state Constitutions. The Deputy County Attorney subsequently advised that furnishing an interpreter would offend constitutional prohibitions contained in both the federal and state constitutional charters.

Petitioners readily admit that the parochial high school in which the Zobrests enrolled their child is a pervasively religious institution that holds and encourages daily worship services and emphasizes religious values (Petitioners' Brf. at 3, 10). Petitioners acknowledge that the district court "was correct in saying that religion pervades the Salpointe curriculum" and "[t]hat the interpreter conveys religious messages is a given in the case." (*Id.*)

In fact, in reviewing the class and school curriculum in which the interpreter would be required to participate, the court of appeals stated:

Were we to sanction the aid the Zobrests seek, a public employee would be at James Zobrest's side in each of his classes at a sectarian school. With James, the employee would attend religion classes, the nominally "secular" subjects in which as the parties stipulate, Salpointe faculty are encouraged to "assist students in experiencing how the presence of God is manifest," and the masses at which Salpointe encourages attendance. The

interpreter would be the instrumentality conveying the religious message and experience.

963 F.2d 1190, 1194 (9th Cir. 1992). Thus, the particular question before this Court concerns whether a school district can be forced to provide a school district employee (whose services are being paid with tax-derived funds) to work full-time within the confines of a pervasively religious institution for the express purpose of transmitting and translating secular and sectarian teachings and assisting a student in the church's liturgies. It was admitted that the reason why petitioners elected to send their son to Salpointe Catholic High School was religious (Petitioners' Brf. at 3).

There is no apparent claim by petitioners that their child would not have received a full and complete free appropriate public education, together with a certified sign language interpreter, at a public school site. In fact, the record shows that at the junior high school level, the school district furnished the student a mainstream program on public school premises together with resource room assistance, speech/language therapy, and an interpreter for all classes (Petitioners' Brf. at 3 n.1).

Petitioners have admitted that the school district has "continued James in its special education system, providing, pursuant to the EHA, speech therapy services twice weekly to him on public school premises, transportation related thereto, and continuing annually to update his IEP." (Petitioners' Brf. at 6). Thus, EHA services were not denied this student because of his religion. Only the location and necessary nature of those services were specifically tailored to accommodate the student because of the potential constitutional defects inherent in a program provided on sectarian school premises.¹

¹ Amici Christian Legal Society devotes a large portion of its brief erroneously arguing that at least 30 years of this Court's judicial prec-

SUMMARY OF ARGUMENTS

The decision of the court of appeals in this case should be affirmed under this Court's precedents decided under the Establishment and Free Exercise Clauses of the First Amendment. The aid program demanded by petitioners violates the Establishment Clause because it would use tax moneys to hire a public employee who would become the conduit through which a pervasively sectarian school indoctrinates a student in its particular religious faith and through which the student participates in worship services. Under both Religion Clauses, the proposed aid program raises the serious question of whether a pervasively sectarian school will be able to maintain its autonomy by demanding that a state employee observe the school's religiously based rules of conduct while functioning on the religious campus.

edent must now be scrapped because the Establishment Clause, as interpreted by the court of appeals, required that the state deny services because of the student's religion. If, in fact, the school district had withheld services because the student was a member of the Roman Catholic faith, that clearly would be unconstitutional. However, the school district did not refuse or withhold services. The school district did in fact provide services to the student on the premises of the public school. However, the school district could not constitutionally provide the services, as requested, within the confines of an admittedly pervasively sectarian institution.

ARGUMENTS

- I. Under its precedents decided under the Establishment Clause of the First Amendment, this Court should affirm the court of appeals decision in this case because the aid program demanded by petitioners involves the use of tax moneys to hire a public employee who would become the conduit through which a pervasively sectarian school indoctrinates a student in its particular religious faith and through which the student participates in worship services.

Petitioners argue that the school district's concern under both the federal constitutional no-establishment prohibition and the state constitutional proscription² should be ignored because of petitioners' free exercise and equal protection claims (*id.* at 7). It is not the task of the judiciary alone to determine when constitutional boundaries have been crossed. It is also the responsibility of other branches and agencies of government. School district officials too take an oath to uphold the Constitution and are required to operate within its mandates. Certainly, in this situation the public school officials, who were most directly involved in administering the program and who were sensitive enough to the constitutional concern to raise the question with the local legal authority, should not be carelessly second guessed.

In *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972), this Court affirmed a decision holding that exclusion of parochial schools from tax funding of education did not violate the constitutional rights of parents sending their children to such schools.

² Article 2, section 12, of the Arizona Constitution states in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment."

In *Norwood v. Harrison*, 413 U.S. 455 (1973), the State of Mississippi purchased textbooks and lent them to students in both public and private schools without reference to whether any participating private school had racially discriminatory policies. This court concluded that while private schools have a right to exist and operate, the state is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that which it provides to public schools. Chief Justice Burger found in *Norwood*:

Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

Id. at 462.

Subsequently, the Supreme Court affirmed a similar determination made on appeal from the United States District Court for the Western District of Missouri in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). In that case the State of Missouri provided bus transportation to public school children but refused to do so for certain private school children. A Missouri taxpayer, who sent his children to a parochial school in accordance with his religious conscience, brought a lawsuit claiming that the denial of bus transportation to parochial school students violated his and

his children's due process, equal protection, and free exercise rights.

Relying on the state constitutional prohibition against aid to religion determined to be stricter than the Establishment Clause of the United States's Constitution, the district court rejected the taxpayer's claim. The court concluded that the Missouri program of excluding private school children from the transportation service was in pursuit of a valid state interest in "maintaining a very high wall between church and state." *Id.* at 383. In so doing, the court rejected the parent's equal protection and free exercise claims.

On appeal, Justice White and former Chief Justice Burger were the only two to dissent and would have noted probable jurisdiction and set the case for oral argument. However, Justice White did so by noting that in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court found that providing reimbursement to parents for the transportation of their children to and from school "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Luetkemeyer*, 419 U.S. at 889. Justice White stated "[c]learly this Court viewed the program of bus transportation as a service 'so separate and so indisputably marked off from the religious function . . . ' that it could not be considered aid to religious schools in violation of the Establishment Clause." *Id.*

Nevertheless, Justice White did acknowledge that "[t]he enforcement of church-state separation could in many instances be a valid state interest—but after *Everson* it would be difficult to assert that refusal to extend busing to parochial-school children, without more, furthers a legitimate state interest in avoiding church-state entanglements." *Id.* at 890. Justice White implies that he would be deferential to state concerns on an equal protection challenge where the state asserts "a valid interest supporting the different

treatment accorded public-school and parochial school students."

In this case it is critical to note that the constitutional question does not involve the facial validity of a federal or a state statute. Instead, it involves the administration by a school district of a program of aid to handicapped children. This Court in *Bowen v. Kendrick*, 487 U.S. 589 (1988), noted the importance of the distinction between a "facial" and "as applied" analysis when reviewing a case involving no-Establishment Clause concerns. *Bowen* involved both types of challenges. In *Bowen* this Court stated:

In several cases we have expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible.

Id. at 601. Justice O'Connor in her concurrence in *Bowen* observed that "any use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (emphasis in original).

Whether the aid either directly or indirectly flows to a pervasively religious institution is not the only question which must be addressed. This Court must determine whether the school district would thereby be involved in assisting a sectarian institution and religious worship. Here, a governmental entity would be required to hire or contract with an individual for the avowed purpose of providing direct religious training and indoctrination.

Petitioners, citing *Widmar v. Vincent*, 452 U.S. 263, 274 (1981), argue that the "provision of benefits to so broad a spectrum of groups is an important index of secular effect." (Petitioners' Brf. at 16). The district court, however, properly observed that "[t]o identify 'primary effect,' we narrow our focus from the statute as a whole

to the only transaction presently before us," citing *Hunt v. McNair*, 413 U.S. 734, 742 (1973).

In fact, *Bowen* utilized just such an analysis in addressing the facial attack on the Adolescent Family Life Act. There, this Court clearly looked at the breadth of potential recipients under the program when addressing the facial validity issue. For instance, when discussing the "effects" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court, citing *Mueller v. Allen*, 463 U.S. 388 (1983), stated that "the more difficult question is whether the primary effect of the challenged statute is impermissible." *Bowen*, 487 U.S. at 604 (emphasis supplied). The Court thereafter observed that a broad range of organizations were potential recipients. *Id.* at 608.

Even then the Court was cautious to observe that "even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion." *Id.* at 609. The Court then noted that "[o]ne way in which direct government aid might have the effect is if the aid flows to institutions that are 'pervasively sectarian.'" *Id.* at 610. The Court, however, concluded that "nothing on the face of the AFLA indicates that a significant proportion of the federal funds will be disbursed to 'pervasively sectarian' institutions." *Id.* at 610.

That, however, did not end the inquiry in *Bowen*. After finding that because the range of potential recipients was broad and because there was no indication that a significant proportion of the federal funds would be disbursed to pervasively sectarian institutions, this Court narrowed its focus to look at the question of whether the statute was unconstitutional as applied. It first determined whether those challenging the statute had standing. *Id.* at 618-19. But it then directed the district court on remand to consider whether the aid had been used to fund specific re-

ligious activities. *Id.* at 621. Without question, the breadth of the potential recipients becomes completely irrelevant if the Court finds that a specifically challenged expenditure will be used to directly advance or enhance a religious activity or to provide public funds to promote religious doctrines.

Petitioners argue that "[t]he service of the interpreter for James at Salpointe produced *multiple* effects, most of those being identical to the secular effects produced in public schools." (Petitioners' Brf. at 10). According to petitioners, "if the word 'primary' is to have any meaning, one out of many effects of particular governmental action may not automatically be held 'primary' simply because it is religious." (*Id.* at 9).

Despite the fact that the courts have used the words "principal" or "primary effect," as used in *Lemon*, 403 U.S. at 612, there is no requirement that the Court determine whether some permissible effect is the "primary" effect of the statute. Rather, unless the unconstitutional effect is "remote or incidental," the Establishment Clause is violated. *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 784, n.39 (1973), quoting *McGowan v. Maryland*, 366 U.S. 420, 450 (1961). This gloss on the primary effect test is explained by the fact that the First Amendment prohibits laws "respecting an establishment" of religion, which is noted and emphasized in *Lemon* itself.

Tilton v. Richardson, 403 U.S. 672 (1971), resolved any lingering doubt as to the scope of the effect test. As explained in *Nyquist*, 413 U.S. at 783-84 n.39:

Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the *mere possibility* that a federally financed structure might be used for religious purposes 20 years hence was constitutionally un-

acceptable because the grant might "*in part* have the effect of advancing religion." 403 U.S. at 683.

(First emphasis supplied; second emphasis in original.)

Petitioners' "multiple" effects argument has no life whatsoever in light of this Court's "as applied" analysis in *Bowen*. Here, the school district and its legal advisors, who were required to decide whether the placement of one of its employees within the environs of a pervasively sectarian school was either constitutionally required or even permissible, were in the very best position and here clearly entitled to conclude that a primary effect of such state action would be assisting in the inculcation of religion.

Petitioners argue that this case is controlled by *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986), concluding that there is no distinction between the blind student receiving a grant for vocational education which the student determined would be used for theological training and the situation here where the school district is faced with whether to hire or contract with an individual to provide educational services on the premises of a pervasively sectarian institution. This Court in *Witters* found that the assistance provided directly to the individual under the state vocational rehabilitation services statute did not offend the Establishment Clause of the First Amendment for several reasons, not the least of which was the fact that the grant to the individual did not involve state action nor did the recipient's choosing to utilize neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion. *Id.* at 488-89.³

³ In Judge Tang's dissent below he recognized that "the money in *Witters* went first to the student and then to the school, whereas in this case the money goes from the state directly to the interpreter." 963 F.2d at 1201. But he concluded that this distinction was consti-

The *Witters* Court concluded that the arrangement was no different from that in which the state issued a paycheck to one of its employees who choose to donate all or a portion of his paycheck to a religious institution, even though the state might be aware of the fact that the employee intended to dispose of his salary in that manner. *Id.* at 486-87. This Court was careful to distinguish between a situation in which the individual was merely a conduit to funnel dollars to sectarian institutions (which would be state action) from that in which the recipient was both the technical and actual decision-maker of whether funds might ultimately be received by a religious institution. The Court further excluded from sanctioned practices an arrangement whereby aid to religion might be "properly attributable to the State." *Id.* at 489.

Equally important in the context of this case is the fact that even in *Witters* the Court refrained from ordering the state to provide the funds or services. Instead, the matter was remanded with the notation that "the state is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution." *Id.* at 489. The Court specifically declined "petitioner's invitation to leapfrog consideration of those issues by holding that the Free Exercise Clause *requires* Washington to extend vocational rehabilitation aid to petitioner regardless of what the State Constitution commands or further factual development reveals." *Id.* at 489. Thus, *Witters* does not require a reversal in this case.

Justice O'Connor in *Witters* found that "[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or

tutionally irrelevant. Judge Tang, however, failed to note that the interpreter at all times is a school district employee and thus a state actor, thus not only providing the school district's symbolic presence, but also providing potential for impermissible church-state entanglement, neither of which concerns was present in *Witters*.

belief." *Witters*, 474 U.S. at 493. In neither *Mueller v. Allen*, 463 U.S. 388 (1983), nor *Witters* were governmental agencies directly involved in the educational programs. No governmental employee in either *Mueller* or *Allen* was hired and placed in sectarian school classrooms. Here, either a school district employee or an individual contracted for use by the school district would provide the services on sectarian school premises on an ongoing basis.

Petitioners also argue that this case is governed by *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The legislation in *Allen* provided that local school boards were to purchase textbooks and lend them without charge to children in public or private schools. The textbooks were to be those used in any public elementary or secondary schools of the state or approved by any board of education. *Id.* at 239.

The *Allen* Court, at least in part, based its decision on its earlier finding in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), involving transportation of children to and from school. *Id.* at 243. The Court observed that books were different from buses, since bus rides have no inherent religious significance, while religious books are common. *Id.* at 244. However, the Court observed that language in the New York statute involving textbooks "does not authorize the loan of religious books, and the State claims no right to distribute religious literature." *Id.* at 244. The *Allen* Court specifically noted that "only secular books may receive approval" and observed that the law was construed by the Court of Appeals of New York as "merely making available secular textbooks at the request of the individual student." *Id.* at 245. The Court further found:

In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

Id.

This Court in *Allen* further stated that a state had an interest in the secular teaching that accompanied religious training in parochial schools, *id.* at 245, and that "if the State must satisfy its interests in secular education through the instrument of private schools, it is a proper interest in the manner in which those schools perform their secular educational function." *Id.* at 247. The Court concluded that based upon the meager *Allen* record, "we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to the students by the public are in fact instrumental in the teaching of religion." *Id.* at 248.⁴

Of course, the instant case is substantially different from *Allen*. The signing interpreter would not be relegated to school activities that are exclusively secular. Rather, it was admitted that the signer would be an instrument both in the teaching of religion and in participation in worships and other religious exercises. In using the words of the Ninth Circuit in this case, "the assistance the state would provide . . . cannot be said to be of a *clearly secular and separable* nature." 963 F.2d at 1196 (emphasis supplied).

In *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court reviewed *Everson* and *Allen* and stated:

In *Everson*, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial schoolchildren for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge"

⁴ The majority in *Allen* noted that "the line between state neutrality to religion and state support of religion is not easy to locate." *Allen*, 392 U.S. at 242.

of impermissible state aid. . . . [Citation omitted] In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incident effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

Id. at 775 (emphasis in original).

Nyquist thus recognized the narrowness of the channel of permissible aid and required a determination that the financial assistance provided by government would aid only the secular functions of the sectarian school. Then, and only then, was the aid to religion considered indirect and incidental.

Like the petitioners here, the parents in *Nyquist* argued that the grants involved in New York's tuition reimburse-

ment program were made to the parent and not to the sectarian school and therefore under *Everson* and *Allen* "respected the 'wall of separation' required by the Constitution." *Id.* at 781. This Court in *Nyquist*, however, stated that *Allen* and *Everson* "make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." *Id.* The Court analogized the bus fare program of *Everson* to be similar to police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. "Such services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture towards religious institutions." *Id.* at 781-82 (citation omitted). The Court noted that the opinion in *Allen* "emphasized that upon the record in that case there was no indication that any textbooks would be provided for anything other than purely secular courses." *Id.* at 782.

In *Meek v. Pittenger*, 421 U.S. 349 (1975), this Court agreed that "as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities." *Id.* at 364. The Court, however, confined such permissible aid to "secular and nonideological services unrelated to the primary, religious-oriented educational function of the sectarian school." *Id.* Here the special education services are directly related to the primary religious-oriented educational function of the sectarian school.

In *Wolman v. Walter*, 433 U.S. 229, 251 (1977), this Court stated:

The State [in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)] attempted to justify the program, as Ohio does

here, on the basis that the aid flowed to the parents rather than to the church-related schools. The Court observed, however, that, unlike the bus program in *Everson v. Board of Education* . . . and the book program in *Allen*, there "has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' " . . . *Lemon v. Kurtzman*, 403 U.S. at 613.

Petitioners argue, contrary to the lower court's conclusion, that the holding in *Wolman* requiring a finding that the supplying of the services was unconstitutional is really supportive of their claim. They argue that "[t]he certified sign language interpreter, selected and employed by the public authority to perform a mechanical function, severely bound by his professional Code of Ethics, and functioning between a teacher and a student, is nowise comparable to a religious school teacher." (Petitioners' Brf. at 20) (emphasis in original).

The *Wolman* Court, however, distinguished between diagnostic services on the one hand and teaching or counseling on the other on the basis that diagnostic services "have little or no educational content and are not closely associated with the educational mission of the nonpublic school." *Id.* at 244. The Court in *Wolman* noted that the diagnostician had only limited contact with the child and "[t]he nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student." *Id.* at 244.

A sign language interpreter comes closer to a teacher or counselor in duties, student contact, and educational involvement than a hearing diagnostician since the contact is not time limited but is intimate and ongoing throughout

the school day and school year.⁵ Here the services provided in the special education program are not diagnostic. They involve a one-on-one type of relationship concerning educational content, and because the child is mainstreamed into the total curricular and extra-curricular program of the school, the sign language interpreter becomes an integral part of the religious mission of the school.⁶ Contrary to the situation where a diagnostician has only limited contact with the child, the sign language interpreter has intimate, ongoing, and continuing contact.

The *Wolman* Court recognized the risk of transmitting ideological views where there is such a close relationship established with the pupil. *Id.* at 247. Here, as even acknowledged by petitioners, there is no question that the sign language interpreter would be transmitting ideological

⁵ In *Wamble v. Bell*, 598 F. Supp. 1356, 1371 (W.D. Mo. 1984), the district court found that "teachers are afforded a unique opportunity to form substantial and endearing relationships with students and to transmit ideological views." This is particularly problematic when the relationship, as here contemplated, is a one-on-one arrangement.

⁶ The placement of a sign language interpreter full-time on the premises of a sectarian school stands in stark contrast from the Title I (now Chapter 1) program invalidated in *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar* the Title I personnel had their own separate classroom within the school from which all religious symbols were removed. *Id.* at 407. As Justice O'Connor pointed out in *Aguilar*, Title I personnel

cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the school or introduce any religious matter into their teaching.

Id. at 428 (O'Connor, J., dissenting). Justice O'Connor also noted that, unlike here where the sign language interpreter would be assigned full-time at the parochial school, in *Aguilar* "78% of Title I instructors . . . visit more than one school each week." *Id.* at 425.

views.⁷ And since the individual involved in the transmission of those views is a governmental agent, the imprimatur of the state is impressed upon the arrangement.

Petitioners argue that the sign language interpreter would not be anything other than a transmitter between the sectarian school teacher and the student. Even if this were an important distinction, which we believe it is not, there is no reason why a court should give greater deference to the professional code of a certified signing interpreter than it has to the professional standards of certified teachers. In *Meek v. Pittenger*, 421 U.S. at 369, this Court stated:

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity. For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

The *Meek* Court was, as was the court below, concerned with the activity of the state-paid personnel. In *Meek*, the Court, quoting *Lemon*, stated that "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion" *Id.* at 369. It makes

⁷ Petitioners cite Judge Tang, dissenting below who concluded that providing an interpreter was no different than providing a student with eyeglasses or a hearing aid (Petitioners' Brf. at 18). But here the aid is restricted only to sectarian education and worship. The state clearly would not be permitted to provide earphones for the hard of hearing at churches.

little difference whether the individual subsidized by the state is a teacher or an interpreter. What is important from a constitutional view is whether the individual transmitting the religious message is subsidized or paid for by the state.⁸

In *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court stated that its "cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs." *Id.* at 389. As this Court stated, "[g]overnment promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines." *Id.* at 389. Action of a school district placing an employee in a pervasively sectarian environment throughout the school day to assist in the transmission of sectarian beliefs may easily be perceived as resulting in a symbolic union. In *Zobrest*, those making the determination that the providing

⁸ Little reliance should, in the context of the facts of this case, be placed on *Allen*. As stated in *Wolman v. Walter*, 433 U.S. at 251 n.18, "*Board of Education v. Allen* has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes. In more recent cases, however, we have declined to extend that presumption of neutrality to other items in the lower school setting. . . . When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course." Of course, textbooks are not the same as employees. As the Court stated in *Lemon* "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 619. A sign language interpreter is no more subject to book-like examination than a teacher. The Court in *Lemon* did not find professional standards to be a sufficient protection given the prohibition of the First Amendment.

of a sign language interpreter violated the Establishment Clause were presumably reasonable observers. Thus, this Court should be reluctant to overturn the conclusion of both the district court and the court of appeals, which concluded:

The interpreter would be the instrumentality conveying the religious message and experience. The presence and function of an employee paid by the government in sectarian classes would create the "symbolic union" *Grand Rapids* found impermissible. By placing its employee in the sectarian school to perform this function, the government would create the appearance that it was a "joint sponsor" of the school's activities.

963 F.2d at 1194-95.

Judge Tang correctly observed that "[t]o decide whether the provision of a sign language interpreter would sufficiently enmesh the government in religious matters to offend the Establishment Clause, one must assess carefully the interrelationship of church and state that results when such assistance is provided a student." 963 F.2d at 1202. The court expressed its concern as to supervision by the school district of the interpreter's job performance.

II. Under the Establishment and Free Exercise Clauses of the First Amendment, the aid program demanded by petitioners raises the serious question of whether a pervasively sectarian school will be able to maintain its autonomy by demanding that a state employee observe the school's religiously based rules of conduct while functioning on the religious campus.

There is another entanglement concern with which this amicus curiae has particular concern. If an interpreter's services are requested by a parent and required to be

delivered, what effect does this have on the sectarian school's authority over its student and staff?⁹

Students enrolled in most sectarian schools are subject to specific rules of conduct and are required to attend religion classes and various religious services. For example, most Seventh-day Adventist parochial schools conduct a week of prayer during which students are called upon to commit their lives to the Lord. In addition, both students and staff are required to abide by significant restrictions on conduct and dress while on campus and to participate in the religious activities provided. They may not use tobacco or alcohol products or wear jewelry or immodest apparel while on campus. Could such a sectarian school impose its religious restrictions on a public school employee working on its campus?

If those in charge of a sectarian school should attempt to limit or restrict the dress or activities of the interpreter and the student's parents oppose the sectarian school's position, may the parents require a "due process" hearing conducted by the state or local educational agency under 20 U.S.C. § 1415(b)(2)? Would the "stay-put" proviso of 20 U.S.C. § 1415(e)(3), which provides that during the pendency of any proceeding initiated under EHA, unless the state or local educational agency and parents otherwise agree, "the child shall remain in the current educational placement of such child." See *Board of Educ. of City of New York v. Ambach*, 612 F. Supp. 230 (D.C. N.Y. 1985);

⁹ In *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974), the court held that the mere fact that students attending Bob Jones University were receiving federal assistance through the operation of the Veteran's Educational Benefits Act was a sufficient nexus to give the government control over certain aspects of the school's policies, even though it conflicted with the school's free exercise rights. The court in *Bob Jones* stated that "[i]n extending financial assistance, Congress unquestionably has plenary authority to impose such reasonable conditions as the use of granted funds or other assistance as it deems in the public interest." *Id.* at 606.

Carey on Behalf of Carey v. Maine School Administration
Dist. No. 17, 754 F. Supp. 906 (D. Me. 1990).

This amicus has an additional concern. Although petitioners to some extent argue only in favor of validating an arrangement by which a school district supplies a sign language interpreter to a deaf student enrolled in a parochial school, their argument seems to be broader than the relief requested. Using *Everson*, petitioners seem to claim that since EHA is a generally available public welfare program for the support of all handicapped children, the services sought may be constitutionally provided.

The limitation of such an interpretation of the Establishment Clause is also contained in the amicus brief of the Christian Legal Society which argues in favor of the constitutionality of any program providing aid to both public and nonpublic school children on a non-discriminatory basis and suggests that this Court adopt a "government neutrality" approach. (Christian Legal Society Amicus Brf. at 18). That amicus contends that "the constitutional inquiry is satisfied if the state has not favored religion over nonreligion or created incentives for the practice of religion." (*Id.*).¹⁰

Such an approach would "let the genie out of the bottle." *School Dist. of Grand Rapids v. Ball*, 473 U.S. at 397. The nature of such aid would result in substantial moneys flowing from the state to the church with little, if any, guidelines to divide the precincts of the church from that of the state. But, as this Court stated in *Lemon*:

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.

¹⁰ Thus, so long as tax dollars flow equally to public and nonpublic schools, the Establishment Clause is not offended.

403 U.S. at 621.

This concern was addressed in *Lemon v. Kurtzman*, 403 U.S. at 651-52, by Justice Brennan in his concurring opinion:

Moreover, when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admission policies and faculty selection.

Also, Justice White, in his dissent in *Lemon*, stated that legislation providing assistance to any sectarian school which restricted entry on religious or racial grounds would, to that extent, be unconstitutional. *Id.* at 671 n.2. Justice White said that any government aid to schools which require attendance at instruction in tenets of a particular religious faith would also be unconstitutional. *Id.* See also *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973).

One commentator, referring to remarks made by Professor Paul A. Freund of Harvard University, observed:

Moreover, Freund posed an additional constitutional problem confronting such [governmental aid] programs growing out of potential application of the fifth and fourteenth amendments. That is, if a church school receives some public aid, does this not convert it to a publicly-supported institution subject to the same standards and requirements, such as the equal protection clause of the fourteenth amendment, as other public institutions? Freund finally called attention to Justice Brennan's concurring opinion in *Dicenso* [*Lemon v. Kurtzman*] where he stressed that if governmental aid to parochial schools were permitted, "At some point the (church) school becomes public for more purposes than the church would wish." This prompted Justice Brennan to

observe, "The church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause."

Boles, *The Burger Court & Parochial Schools: A Study in Law, Politics & Educational Reality*, 9 Val. U.L. Rev. 459, 482 (1975).

Church organizations have over the years united to fight government intrusion into their religious affairs. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). The Seventh Circuit in *Catholic Bishop* observed that an even-handed approach to the First Amendment would seem to suggest that the Religion Clauses, serving as they do as a buckler to prevent financial aid to sectarian schools, should not be any less effective to ward off the inhibiting effect of governmental controls and demands. *Catholic Bishop v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977). This amicus is concerned, however, that should the buckler be removed, there would be no shield inhibiting governmental controls and demands.

The argument is advanced by the Christian Legal Society in its amicus brief that:

The Free Exercise Clause forbids Congress (and, after incorporation through the Fourteenth Amendment, any government) to discriminate against religion. The Establishment Clause has been interpreted to forbid the government to aid or advance religion. In a world in which the government aids or advances many different causes and institutions, this means that the government must discriminate against religion in the distribution of benefits. Thus, the Establishment Clause is said to require what the Free Exercise Clause forbids.

(Christian Legal Society Amicus Brf. at 3).

The Christian Legal Society misunderstands the impact of the Religion Clauses of the First Amendment. The Free Exercise Clause and the Establishment Clause are complementary. But if the Free Exercise Clause requires that the state pay for the same services at a sectarian school as the taxpayers provide to a public school, it would swallow up the Establishment Clause.

The Religion Clauses, taken together, have a very specific purpose. As the Court stated in *Lemon*, 403 U.S. at 614, the "objective is to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."¹¹

This Court has declared that it will "not tolerate either governmentally established religion or governmental interference with religion." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970). In *Walz*, this Court recognized the importance of chartering a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church. *Id.* at 672.

Professor Carl H. Esbeck has written in *Establishment Clause Limits on Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 371 (1984):

As we have seen, however, the principle of separation arose not from the prudential reasoning characteristic of the sociopolitical rationale but from a natural rights view as evidenced in eighteenth century political thought. The natural

¹⁰ In *Allen v. Morton*, 459 F.2d 65 (D.C. Cir. 1973), the court suggested that government involvement with religion should be kept to a minimum and that not only actual interference, but the "potential for and appearance of interference with religion," should be avoided. *Id.* at 75.

rights theory argues from higher ground; namely, there are certain inalienable rights which cannot legitimately be denied. *The theory holds that religious organizations are different from other communal societies and that this uniqueness is critical to understanding the First Amendment.* For example, although the Amendment deals only by implication with associational rights, the establishment clause takes specific account of religious organizations through the separation requirement. The separation, of course, is of government and religious organizations, not government and individuals holding religious beliefs (the latter being an impossibility). The place of religious institutions, therefore, has long recognized as a special problem for which the establishment clause makes special provision.

(Emphasis supplied.)

Religious organizations have long claimed the right to discriminate in the hiring and maintaining of their preaching and teaching ministries. They also have long held the view that they must be permitted to discriminate on a religious basis as to membership and enrollment within their institutions. In a case involving the hiring of a minister, the Seventh-day Adventist Church successfully argued this issue before the Fourth Circuit Court of Appeals in *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985). The Fourth Circuit stated:

"As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Dis-*

crimination by Religious Organizations, 79 Columbia L. Rev. 1514, 1545 (1979).

Id. at 1169. See also *McClure v. Salvation Army*, 465 F.2d 553 (5th Cir. 1970); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); *Maguire v. Marquette University*, 627 F. Supp. 1499 (E.D. Wis. 1986), modified, 814 F.2d 1213 (7th Cir. 1987); *Miller v. Catholic Diocese of Great Falls*, 728 P.2d 794 (Mont. 1986). But the constitutional exemption from anti-discrimination laws afforded to churches under the Free Exercise Clause has its quid pro quo. As churches are shielded by the Religion Clauses of the First Amendment from government involvement in their sectarian ministries, the Establishment Clause sets churches apart from other private organizations and prevents religious organizations from being the recipients of direct funding by tax-derived funds. The religion and no-establishment parts of the Religion Clauses, thus, are not inconsistent, but complementary.

The Council on Religious Freedom believes that this Court has chartered a course of neutrality between the separate and distinct interests beneficial to both church and state. It views with great concern any shift in the judicial balance that has historically been struck in the sensitive area of the relationship between church and state.

This is certainly not the proper case to reject three decades of this Court's wisdom. The Court should resist the invitation to reject the decisional law of this Court which has prohibited the use of any tax-derived funds when the services provided become an instrument for transmitting sectarian views.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 21, 1992 Respectfully submitted,

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No. 92-94

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IN THE
Supreme Court of the United States
October Term, 1992

LARRY ZOBREST, SANDRA ZOBREST, husband and wife; JAMES ZOBREST, a minor, by LARRY and SANDRA ZOBREST, his parents,

Petitioners,

v.

CATALINA FOOTHILLS SCHOOL DISTRICT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

**Brief of the National Jewish Commission on Law and Public
Affairs ("COLPA"), as *Amicus Curiae*, in Support of Petitioners**

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On Writ of Certiorari to the
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for the Ninth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS ("COLPA"), AS
AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF THE
AMICUS CURIAE

A deaf child who is otherwise indisputably eligible for the in-school services of a publicly paid sign-language interpreter has been deprived of the means to understand his classes and communicate with teachers and students only because he attends a Catholic parochial school. A majority of a Ninth Circuit panel has held that James

Zobrest is constitutionally disqualified from the federal program that aids handicapped children because a government employee's presence on the premises of a sectarian school violates the "primary effect" component of the *Lemon v. Kurtzman* test. This callous result grows out of a misapplication of the Establishment Clause and violates rights guaranteed to minority faiths by the Free Exercise Clause of the First Amendment.

The National Jewish Commission on Law and Public Affairs ("COLPA") is a non-profit association of volunteer lawyers and social scientists who donate their services for public advocacy on behalf of the Orthodox Jewish community. COLPA has filed briefs on the merits in most of the important religious liberty cases considered by this Court over the past twenty years. See, e.g., *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Mueller v. Allen*, 463 U.S. 388 (1983); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Lee v. Weisman*, 112 S.Ct. 2649 (1992).

This brief is joined by national organizations of Orthodox Jewish rabbis and scholars, as well as synagogues and social service organizations which represent a broad spectrum of the Orthodox Jewish community in the United States. One of the joining groups is the Union of Orthodox Jewish Congregations of

America ("Orthodox Union"), a coordinating body for approximately 1,000 Jewish congregations in the United States. A major effort of the Orthodox Union is a program called "Our Way," established in 1969, which seeks to assist the Jewish deaf and hearing-impaired and to promote the accommodation of their special needs.

The other groups joining in this brief are:

Agudath Harabonim of the United States and Canada--The oldest Orthodox rabbinical organization in the United States, whose membership includes leading scholars and sages. It is intimately involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America--A national Orthodox Jewish public interest organization with chapters in numerous Jewish communities throughout the United States and Canada. Through its Commission on Legislation and Civic Action and various other organizational divisions, Agudath Israel represents the full spectrum of Orthodox Jewish educational entities before federal, state and local government bodies.

National Council of Young Israel--A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel. It is involved in matters of social and legal significance to the Orthodox Jewish community.

The Rabbinical Alliance of America--An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been actively involved in a variety of religious, social and educational areas affecting Orthodox Jews.

The Rabbinical Council of America--The largest Orthodox Jewish rabbinical organization in the world with a membership in excess of 1,000. It is deeply involved in issues related to religious freedom.

Torah Umesorah--The National Society for Hebrew Day Schools is the coordinating body for more than 600 Jewish Day Schools across the United States. As an integral part of the non-public school community, Torah Umesorah regularly relates to government agencies and officials on educational issues affecting that community and has a continuing concern for the delivery of services to non-public school students.

We are supporting the petitioners in this case because we believe that the Ninth Circuit's use of the Establishment Clause to strike down religiously neutral benefits to religious school children who would otherwise qualify under child-welfare programs authorized by federal law for *all* students is a serious blow at religious liberty and is wholly unjustified by the language, policies, and sound judicial application of the First Amendment.

We direct this brief to three subjects that govern the proper outcome of this case:

First, we discuss the *form* of the state aid provided to the petitioners and note that it is, in no sense, governmental encouragement of or involvement in religion. A sign-language interpreter provides an individualized remedial service that is wholly secular and functional. He or she merely facilitates communication by others with a disabled person.

Second, we consider the *location* of the assistance provided by such an interpreter. In companion cases decided by close divisions in 1985 the Court held that even wholly secular instruction given by public school personnel may violate the Establishment Clause if the instruction is given in "identifiably religious schools." A five-member majority of the Court concluded that remedial education classes may not be taught by public school personnel in

sectarian school buildings because such instruction presents a "substantial risk of state-sponsored indoctrination" and because monitoring of such a program to prevent the feared indoctrination amounts to constitutionally forbidden "entanglement" of church and state.

The two 1985 rulings were challenged when rendered by three Justices who are presently on the Court (along with then Chief Justice Burger). The two decisions were unsound when issued, and they have had devastating consequences for thousands of disabled and needy children who most require government help to enable them to reach their potential and live full and productive lives as American citizens. The decisions have also produced huge wasteful expenditures of public funds. We urge the Court to prevent further tragedy and waste by formally repudiating the highly mischievous decisions in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985).

Third, we review the necessary impact of the ruling below on the exercise of religious beliefs by parents of school children who are in the position of the petitioners. By denying a sign-language interpreter to a deaf child *only because he attends a sectarian school*, government authorities erect a significant obstacle to the child's attendance at religious school and discourage the exercise of religious beliefs by him and his parents. The Free Exercise Clause of the First Amendment has absorbed a recent body blow from this Court, but that Clause continues to protect religious adherents against the selective discrimination that results from the rulings of the court below.

ARGUMENT

I

**PROVIDING A SIGN-LANGUAGE INTERPRETER
IS A MEANS OF AIDING A CHILD WITH A
PERSONAL HEALTH IMPAIRMENT AND IS,
THEREFORE, EQUIVALENT TO CHILD-
WELFARE MEDICAL ASSISTANCE THAT
PRESENTS NO ISSUE UNDER THE
ESTABLISHMENT CLAUSE**

This case concerns a form of assistance to individual students that is singularly unrelated to the harms that the Establishment Clause is designed to reach. Enabling a deaf high school student to communicate with those around him is entirely consistent with the rule that government should not, in any manner, "aid one religion, aid all religions, or prefer one religion over another" (*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)) and with the principle that the Constitution forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity" (*Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)). A sign-language interpreter is not a religious proselytizer, and, even in the "environment" of a religious school, he or she does not engage in "state-sponsored indoctrination."

The job of a sign-language interpreter is to translate sounds into visually perceived hand gestures. The message communicated to the deaf person by the interpreter is the message expressed by a speaker. The interpreter's role is the same as that of a hearing aid used by a child who has a relatively minor hearing impairment and the same as a pair

of eyeglasses used by someone who has faulty vision.

Disabled children may rely on various devices that assist them to function more easily in a school setting. Paraplegics may need wheelchairs to go from class to class. Blind or nearly-blind students may need canes or dogs to enable them to move about or high-powered ocular lenses to capture a visual image of a student. Other children may use artificial limbs to hold books or writing implements. All these devices are intrinsically personal to their users and are religiously neutral. They enable an individual handicapped student to function in his or her school setting. A sign-language interpreter is a human analogue of any of these devices.

The fact that a handicapped child is attending a religious school and goes from his class to a religious chapel does not turn the wheelchair he uses into a sacred carriage. Nor does the cane held by a blind student to facilitate entry into a Bible class become a holy staff because it makes religious instruction possible. No rational person views a hearing aid as a sacred object if its user relies on it to hear prayers and sermons. By the same token, a sign-language interpreter is not transformed into a religious functionary merely because a portion of his day is spent interpreting religious instruction in a parochial school.

The logic of the Ninth Circuit's ruling would require the invalidation of public bus transportation for parochial-school students who are, after all, brought to the school chapel in which they pray each morning, as well as to their history classroom, by the school bus. It would require courts to declare parochial school students ineligible for school lunch or milk programs because the children who eat lunch or drink milk are thereby nourished not only while studying reading and arithmetic, but also while

learning the Bible and reciting prayers.

The appropriate line heretofore drawn between constitutionally permissible aid to children and constitutionally forbidden aid to religion turns on whether the benefit provided by government significantly helps the child individually and personally in areas other than religious indoctrination. A child who travels on a publicly financed school bus is relieved of the stresses and dangers of private travel from home to school. That is a personal secular benefit, having no intrinsic religious component. The same is true of a child who is nourished on school premises.

Services or devices that aid a child who is physically disabled fall into the same category. Eyeglasses, hearing aids, wheelchairs, and artificial limbs are personal secular benefits. They help a handicapped child deal with many situations he or she encounters in school and elsewhere. Religious education and training are among a child's experiences, and services and devices that help a child function with disabilities necessarily assist the child in prayer, Bible study, and other religious observance. But this assistance is merely part of a more comprehensive effort to enable the handicapped child to adapt to the world around him.

A sign language interpreter who accompanies a deaf child to religious classes as well as to arithmetic and geography lessons is, by the same token, serving the child personally, not advancing the religious denomination that operates the school. The interpreter permits the child to communicate with teachers and classmates *on all subjects*, religion being only part of the child's total life.

Consequently, government funding of the interpreter during school hours, no matter what school the child attends, is a benefit to the child, not a means to aid or

advance religion. It is remote from the evils at which the Establishment Clause is directed and is wholly beyond that constitutional prohibition.

II.

THIS COURT SHOULD OVERRULE PRECEDENTS THAT INVALIDATE OTHERWISE PERMISSIBLE GOVERNMENT PROGRAMS ONLY BECAUSE THEY ARE LOCATED ON THE PREMISES OF RELIGIOUS SCHOOLS

We turn now to the question of *location*. A majority of the Ninth Circuit panel was persuaded to reach its finding of unconstitutionality by the fact that the interpreter's services were being provided "at a sectarian school." The court's opinion noted twice that the effect of public funding of James Zobrest's interpreter was "placing [a government] employee in a sectarian school" (Pet. App. A-10; *see also* Pet. App. A-11 ("the government would be required to place its own employee in the sectarian school"))).

The Ninth Circuit relied on this Court's decision in *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), in arriving at this result (Pet. App. A-9, A-10). The *Grand Rapids* case, together with its companion, *Aguilar v. Felton*, 473 U.S. 402 (1985), did indeed invalidate remedial secular programs, conducted by public school personnel under the supervision of secular public school authorities, merely because they were located on the premises of religious schools. A bare majority of the Court concluded that there was a *risk* that teachers on the premises of a sectarian school "may well subtly (or overtly) conform their instruction to the environment in which they teach,

while students will perceive the instruction provided in the context of the dominantly religious message of the institution, thus reinforcing the indoctrinating effect." 473 U.S. at 388.

There was no factual evidence in either the *Grand Rapids* or *Aguilar* records to support the existence of such a "risk." Nonetheless, on the basis of this speculation, a majority of the Court struck down a program that had, in the previous year, provided greatly needed assistance to 184,532 educationally deprived children attending private schools. See U.S. Department of Education, *A Summary of State Chapter 1 Participation and Achievement Information*, p. 5 (1992); *The New York Times*, June 18, 1986, p. 15, col. 1; Lines, *The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?*, 17 *Journal of Law & Education* 1, 28 (1988).

Strong dissenting views were expressed by four Justices. In the conclusion to her cogent dissent, Justice O'Connor said (473 U.S. at 431):

For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek v. Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once

attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause.

Statistics maintained by the United States Office of Education show that in the year following *Grand Rapids* and *Aguilar* there was a significant drop of 31 percent in the number of disadvantaged students in private schools served by Title I programs under the Elementary and Secondary Education Act of 1965. In the Jewish religious schools, approximately 60 percent of the students serviced before *Grand Rapids* and *Aguilar* were not provided Title I services in the following year. See testimony of David Zweibel, General Counsel and Director of Government Affairs of Agudath Israel of America, before the Subcommittee on Elementary, Secondary and Vocational Education of the House Education and Labor Committee, March 30, 1987.

In succeeding years, as religious schools turned to off-premises instruction in mobile vans, the numbers increased slightly. But the Office of Education statistics show that whereas 184,532 private school students benefited from Title I assistance in 1984-85, before the *Grand Rapids* and *Aguilar* rulings, the figures for later years were much lower (U.S. Department of Education, *A Summary of State Chapter 1 Participation and Achievement Information*, p. 5 (1992)):

Year	Public School Students	Nonpublic School Students
	Participating in Title I Programs	Participating in Title I Programs
1984-85	4,528,177	184,532
1985-86	4,611,948	127,922
1986-87	4,595,761	137,900
1987-88	4,808,030	136,618
1988-89	4,777,643	137,656
1989-90	5,014,634	151,948

This chart demonstrates that in each of the five years that followed this Court's 1985 rulings, *Grand Rapids* and *Aguilar* deprived between 32,000 and 56,000 needy nonpublic-school students of assistance they would otherwise have received under Title I.

A contemporary analysis of the effects of the *Aguilar* decision observed that "the Court has left few effective means for public authorities to supplement the education of children, rich or poor, whose parents send them to religious schools." Supreme Court Note, 99 Harv. L. Rev. 120, 182 (1985). And the district court opinion in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248, 1255-56 (S.D.N.Y. 1980), had described the unsuccessful efforts that had previously been made to conduct remedial secular programs after school hours and on premises other than at the schools regularly attended by the students. There can be little doubt, therefore, that the practical effect of these two decisions has been enormously damaging.

Since the decision in *Aguilar v. Felton*, educators seeking to restore to disadvantaged students the assistance Congress wanted them to receive under Title I have been compelled tortuously to arrange remedial instruction in mobile vans parked on public property. The result has been use of public funds for the purchase and installation of the vans and much litigation over the constitutionality of this method of providing needed education to otherwise qualified children off the premises of parochial schools. See, e.g., *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

The battle continues and will continue so long as *Grand Rapids* and *Aguilar* express legal standards that educators and courts must apply. The effect of these decisions has been to deprive many growing children of

remedial education for the past seven years and to dissipate resources in court contests and in the purchase of trailers and other temporary structures whose only purpose is to avoid the arbitrary and artificial reach of these rulings.

A graphic description of the likely consequences of *Grand Rapids* and *Aguilar* was given to a House of Representatives subcommittee in March 1987, and the situation then described has continued to this day:

These, then are the problems created by *Felton*: decreased participation by nonpublic school students in the Chapter 1 program; academically and socially unsatisfactory off-premises alternate service delivery mechanisms for students who do participate; staggering administrative expenses necessary to implement such off-premises services; and heightened inter-community strife and tension.

Testimony of David Zweibel, General Counsel and Director of Government Affairs of Agudath Israel of America before the Subcommittee on Elementary, Secondary and Vocational Education of the House Education and Labor Committee, March 30, 1987.

The proposition that any publicly financed instruction that takes place on the premises of a religious school is irreversibly tainted by the environment of the school is, as Justice O'Connor noted in her dissent, an "untenable theory." Its effect is, as former Chief Justice Burger observed, to deny "desperately needed remedial teaching services" to schoolchildren - an enormous "human cost." 473 U.S. at 419. Chief Justice Rehnquist the risk that the Court majority in *Aguilar* found unacceptable as "gossamer

abstractions" and he, too, decried the effect of *Aguilar* as barring "sorely needed assistance" to "educationally deprived children from low-income families." 473 U.S. at 421.

This case tests the logic of *Grand Rapids* and *Aguilar*. Is a governmentally paid interpreter constitutionally tainted because he does his sign language interpreting on the premises of a sectarian school? *Grand Rapids* and *Aguilar* may suggest that he is. We submit that good sense and a sound application of the policies of the Religion Clauses to these facts prove the fundamental error of *Grand Rapids* and *Aguilar*. They should be explicitly overruled so that they will cease to do harm to the schoolchildren and the general welfare of this nation.

III.

THE FREE EXERCISE CLAUSE PROHIBITS DEPRIVING A PAROCHIAL SCHOOL STUDENT OF FEDERAL ASSISTANCE FOR HIS PHYSICAL HANDICAP MERELY BECAUSE HE ATTENDS A RELIGIOUS SCHOOL

There is an aspect of this case that is particularly troublesome to this *amicus*, which represents the Orthodox Jewish community - a large group of Americans whose religious beliefs require them to provide an intensive Jewish education to their children. Religious schools are not a luxury for members of our community; they are central obligations of our faith. Accordingly, we are extremely sensitive to any discrimination in public benefits against children solely and exclusively because they attend religious schools.

James Zobrest is unquestionably the victim of such

discrimination. Apart from the religious character of his school, he is fully qualified for the assistance of a sign-language interpreter under the provisions of the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.* He has been deprived of that assistance solely because he is enrolled in a Catholic parochial school - a constitutionally protected liberty that he and his parents may exercise.

Employment Division v. Smith, 494 U.S. 872 (1990) - which severely impaired the protection afforded religious minorities by the Constitution - does not entitle government to discriminate *against* religious observers. Indeed, the Court's opinion preserves the Free Exercise Clause insofar as it shields religious minorities against selective governmental action. See 494 U.S. at 882, 884. In this case, the Free Exercise Clause entitles James Zobrest to claim the same federal benefits to overcome his deafness as are made available to children who attend nonreligious private schools. Since the only basis for denying him an interpreter is his attendance at a *religious* school, that denial must be set aside under the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with instructions to enter judgment for the plaintiffs.

Respectfully submitted,

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